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APPELLATE COURTS AND PREJUDICED VERDICTS

Thomas L. Shaffer*

Professor Shaffer maintains that the preservation of fair trial in civil cases requires an increased Bench and Bar effort to control prejudicial trial conduct. To support this assertion, he investigates sources of jury prejudice, available and proposed court devices for remedying inadvertent and intentional misconduct by trial attorneys, and appellate court avoidance of corrective sanctions.

The whole setup of our democratic government assumes that the citizen is bright, honest and at least as fundamentally sound as a common stock.

—E. B. White¹

THE jury has its origins in a system of justice imposed by a foreign conqueror as a means for determining local custom and questions of fact put to it by litigants.² It has become, though, a democratic institution, and there can now be applied to it the assumptions of brightness, honesty and fundamental soundness. It is and always has been a panel of citizens who are asked to decide a question which the sworn ministers of justice are for some reason unable or unwilling to answer. The only limitation on these citizens is that they reach their decision on a basis that is as fair as possible and will appear fair to the litigants, and—perhaps more significantly—to the citizenry at large. This limitation explains the exclusion of evidence, a complicated process designed to hide facts, and influences not quite factual, which might cause juries to reach, or cause the citizenry to believe they have reached, an unfair decision. “Thinking is, or ought to be, a coolness and a calmness,” Captain Ahab said, “and our poor hearts throb, and our poor brains beat too much for that.”³

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1. THE SECOND TREE FROM THE CORNER 123-24 (1953).

2. 1 POLLOCK AND MAITLAND, THE HISTORY OF ENGLISH LAW 138-50 (2d ed. 1898).

3. MELVILLE, MOBY DICK 806-07 (Mod. Lib. ed.).

To preserve fairness, and the impression of fairness, is the function of appellate judges faced with the contention that the judgment of the trial court is vitiated by a prejudiced verdict. Yet the system has never allowed the appellant to demonstrate by evidence or reasonably factual inference that the jurors were prejudiced; it has allowed him, at most, to show that occurrences during trial were the kind that might have prejudiced ordinary citizens. Only in the last decade has a noticeable and thorough effort been made to examine empirically the influence of prejudice on the juror's mind, and this has been an academic effort; its methods and results have not reached appellate courts. "We have secrets here," as Madame Epanchin said, "nothing but secrets. It has to be so, it's sort of etiquette."⁴

The purpose of this article is an examination of the treatment given in appellate courts to the argument that juries have been prejudiced by facts that are supposed to be secrets, and by arguments that are supposed to be hidden behind "the curtain of a decent silence."⁵ The article analyzes appellate attitudes primarily in terms of the most recent cases. Only occasionally is reference made to the empirical evidence now being amassed in the University of Chicago's jury project.⁶ The first part of the article will examine the sources of jury prejudice, as they appear in appellate argument, rather than in empirical analysis, with particular emphasis on the effect of information about liability insurance and the effect of illegitimate information introduced into the trial by innuendo. The second part of the article will examine the shields to avoid reversal that appellate judges have erected around themselves—termed herein their "escape valves"—in order to avoid making a decision involving a measurement of prejudice which they tacitly acknowledge to be an impossible task. The third section investigates the range of accepted solutions for the problem of prejudiced juries (including devices which are useful before and during trial, as well as those reasonably available to appellate courts), and considers the discipline of the Bar as a final avenue of cure.

4. DOSTOEVSKY, *THE IDIOT* 77 (Macmillan ed. 1954).

5. MAUGHAM, *THE MOON AND SIXPENCE* 18 (Mod. Lib. ed.).

6. The material which has been published and which is most pertinent to the present subject is in Kalven, *Report on the Jury Project*, AIMS AND METHODS OF LEGAL RESEARCH 155, 168-82 (Conard ed. 1955), and in Broeder, *The University of Chicago Jury Project*, 38 NEB. L. REV. 744 (1959). The general literature is in those articles and in Kalven, *The Jury, the Law, and the Personal Injury Damage Award*, 19 OHIO ST. L.J. 158 (1958), reprinted at 7 U. CHI. LAW SCHOOL RECORD 6 (1958). Professor Kalven's 1955 report and Professor Broeder's report will be hereinafter cited as "Kalven" and "Broeder" respectively. The writer makes no claim to having developed this subject either historically or empirically. The present approach is as functional as analysis will permit and is confined, as nearly as orderly discussion will permit, to recent authority.

I. THE ENGINES OF PREJUDICE

The irrelevancies and passions which inject prejudice into a jury trial are as numerous as the fears and passions of the citizens who sit on juries; the engines of prejudice run not only on ordinary biased attitudes, but also on the fact that the juror is a citizen out of his element; "when one is alone in a strange place, one does not easily imagine innocent things."⁷ The most prevalent prejudicial device is the suggestion—rarely the proof, because the trial judge will not allow that—of an irrelevant fact.⁸ The fact that the defendant carries liability insurance is an example; or the fact that the plaintiff's employer provides workmen's compensation insurance and that therefore there is an insuror waiting to take part of the plaintiff's award in reimbursement; or the fact that one of the litigants is a widow or a poor man with dependents to support.⁹ The insertion into the record of the fact of liability insurance—the disclosure of the hidden litigant—is so common and so typical of other attempts at jury prejudice that it merits an extensive foray into the circumstances under which this fact comes before juries and the attempts of trial and appellate judges to do something about it.¹⁰

The means used for introducing prejudice, as distinguished from the substance producing the prejudice, are as varied as the ingenuity of lawyers and the confines of conscience will permit.¹¹ Prejudice may be introduced through a casual aside, or a whisper during recess, or well-rehearsed spontaneity from witnesses—remarks made so quickly that objection is impossible. Appellate courts are aware of most of the devices, and seem alert to recognize the growth of new ones. An example of this awareness is the recent appellate treatment of prejudice which seeps by innuendo into a record a little at a time; a new trial is sometimes justified, these cases hold, even though no single instance seems rabid enough to have infected the verdict. It is useful to give

7. KRUTCH, *THE BEST OF TWO WORLDS* 28 (1950).

8. "Irrelevant" is used here in Professor Thayer's sense. This means that irrelevancy arises either because of factual irrelevancy or because of a rule of policy. See THAYER, *PRELIMINARY TREATISE ON EVIDENCE* 263-76, 530 (1898); Trautman, *Logical or Legal Relevancy—A Conflict in Theory*, 5 VAND. L. REV. 385 (1952).

9. *Nelson v. Union Wire Rope Corp.*, 39 Ill. App. 2d 73, 187 N.E.2d 425 (1963); *Brabeck v. Chicago & N.W. Ry.*, 264 Minn. 160, 117 N.W.2d 921 (1962), 12 DEFENSE L.J. 228 (1963). See *Pennsylvania Co. v. Roy*, 102 U.S. 451 (1880); *McCarthy v. Spring Valley Coal Co.*, 232 Ill. 473, 83 N.E. 957 (1908); *Jones & Adams Co. v. George*, 227 Ill. 64, 81 N.E. 4 (1907); *Falcon v. LaRoche*, 4 Ill. App. 2d 112, 123 N.E.2d 587 (1954).

10. Prejudice can also come before the jury in argument, of course. See, e.g., *Jacobson v. National Dairy Prods. Corp.*, 32 Ill. App. 2d 37, 176 N.E.2d 551 (1961).

11. *Bulleri v. Chicago Transit Authority*, 41 Ill. App. 2d 95, 190 N.E.2d 476 (1963), provides a representative array.

this new trend separate treatment. This is accomplished here by considering in some detail a 1963 unpublished opinion of the Illinois Appellate Court.

A. Insurance

Somewhere in the dim origins of the action on the case, a canny businessman perceived profit in insuring a man against the risk of a damage judgment (and, somewhat later, he discovered it would stimulate his business if state legislatures required potential tortfeasors, in fact or in effect, to carry liability insurance). At about the same time appellate courts began to fear that jurors favor plaintiffs when determining liability and give larger awards when they know, or think, that the defendant himself will not have to pay the plaintiff. An exclusionary rule of evidence was developed to prevent jurors from finding the hidden litigant. The garden of personal injury litigation was near full flower when the plaintiff's lawyer, faced with the happy circumstance of an insurer to pay his client's judgment, and an unhappy rule of evidence barring the mention of this to juries, began to devise new ways to let juries know about the defendant's insurance.

The hidden litigant is usually a liability insurer. But he may be insuring against property loss or injury suffered by the plaintiff, and that fact causes juries to lower awards.¹² He may be a workmen's compensation insurer paid by the plaintiff's employer, with a right to recover some or all of the plaintiff's judgment.¹³ The rules of evidence universally exclude identification of any one of these; insurance is irrelevant in the factual sense and prejudicially irrelevant in Professor Thayer's sense.¹⁴ Still lawyers arrayed more or less against the insurer's interest have discovered that casual asides, whispers to opponents,¹⁵ questions on voir dire examination,¹⁶ and suggestions that the parties are really friends¹⁷ or relatives¹⁸ (and thus not hostile at all) avoid the effect of the exclusionary rule. Almost any device holds some promise. As the Iowa court once put it:

12. *Brown v. McCuan*, 56 Cal. App. 2d 35, 132 P.2d 838 (Dist. Ct. App. 1942); *Seminole Shell Co. v. Clearwater Flying Co.*, 156 So. 2d 543 (Fla. Dist. Ct. App. 1963); *Neill v. McGinn*, 175 Neb. 369, 122 N.W.2d 65 (1963).

13. *Tipton v. Socony Mobil Oil Co.*, 375 U.S. 34 (1963); *Berryman v. Bayshore Constr. Co.*, 24 Cal. Rptr. 380 (Dist. Ct. App.), *aff'd*, 207 Cal. App. 2d 331 (1962); *Nappi v. Falcon Truck Renting Corp.*, 286 App. Div. 123, 141 N.Y.S.2d 424 (1955), *aff'd mem.*, 1 N.Y.2d 750, 152 N.Y.S.2d 297 (1956).

14. See note 6 *supra*.

15. *Connelly v. Nolte*, 237 Iowa 114, 21 N.W.2d 311 (1946).

16. *McCORMICK*, EVIDENCE 356-57 (1954). (Hereinafter cited as *McCORMICK*.)

17. *Halepeska v. Callihan Interests, Inc.*, 371 S.W.2d 368 (Tex. 1963).

18. *Brown v. Parker*, 375 S.W.2d 594 (Mo. Ct. App. 1964).

[A juror] . . . is just as keen mentally, just as sound and sensible, just as honest as a juror as he was and is as a citizen. He doesn't require a brick house to fall on him to give him an idea.¹⁹

And he doesn't require proof to give him a wealthy defendant. Every trial lawyer knows this; illegitimate information on insurance is doubtless the most fertile source of jury prejudice.

The early judicial reaction was to treat any mention of insurance as fatally prejudicial, whether or not there had been objection and whether or not a therapeutic instruction was given. This was true even of questions on voir dire to discover whether any of the jurors had interests in or sympathies for casualty companies (on the doubtful premise that the questions were aimed at discovering pro-defendant jurors and not at informing the jurors that there was insurance in the case²⁰). But early realism had to yield before the fact that personal injury litigation would put the courts out of business if every mention of insurance automatically required a mistrial. The modern result is an uneasy compromise—the lawyer out to tear the veil from the hidden litigant can suggest a little, but not very much. He can, for instance, ask the “usual questions” on voir dire examination, provided his line of questions “develops in a natural manner and without undue emphasis.”²¹ He may even be able to pursue the subject until his opponent, or the trial judge, stops him.²² And he may be able to go into the subject more thoroughly if he wants to assume the risk that the trial judge may grant a motion for a defendant's instruction which will leave the jurors completely confused:

The only way the suit can be tried is, as a suit between individuals, and you . . . must understand that these are the parties in dispute and no one else is involved in the suit.²³

If he is willing to take a somewhat larger risk of reversal, he can flirt with insurance until his opponent complains so loudly that the appellate court will attribute jury prejudice to the complaint rather than to the questions which provoked it.²⁴

19. *Connelly v. Nolte*, 237 Iowa 114, 132, 21 N.W.2d 311, 320 (1946) (opinion of Bliss, J.).

20. *Swift v. Wimberly*, 370 S.W.2d 500 (Tenn. 1963); see *White v. Standard Oil Co.*, 116 Ohio App. 212, 187 N.E.2d 504 (1962); *Kelly v. Great No. Ry.*, 59 Wash. 2d 894, 371 P.2d 528 (1962).

21. *Bunch v. Crader*, 369 S.W.2d 768, 771 (Mo. Ct. App. 1963); see *Copiah Dairies, Inc. v. Addikson*, 153 So. 2d 689 (Miss. 1963); *Brown v. Parker*, 375 S.W.2d 594 (Mo. Ct. App. 1964).

22. *Woods v. Meacham*, 46 Tenn. App. 711, 333 S.W.2d 567 (1959).

23. *Swift v. Wimberly*, 370 S.W.2d 500, 504 (Tenn. Ct. App. 1963) (quoting the trial transcript).

24. *Santee v. Haggart Constr. Co.*, 202 Minn. 361, 278 N.W. 520 (1938). *But see* *Yoast v. Sims*, 122 Okla. 200, 253 Pac. 504 (1927).

Modern courts appear to consider inadvertent or casual mention of insurance—and this includes the “usual questions” on voir dire, which are neither inadvertent nor casual—as harmless.²⁵ Although some of the older cases treat any mention of insurance as fatal,²⁶ modern judges either assume that the mention is probably not prejudicial,²⁷ or place on the appellant the burden of demonstrating that it was prejudicial.²⁸ Some courts moderate the early rigor by apparently finding fatal prejudice where there is some indication in the record that the jury heard and understood the allusion to insurance. For instance, references to an adjuster in questions to witnesses have by dint of repetition been held to be enough to inform the jury that the defendant was insured.²⁹

The prevalent attitude in the modern cases has been to abandon the early no-mention-at-all rule and reverse only if there is more in the record than bare information to the jury. The cases generally fall into one of two categories, those which reverse when insurance was repeatedly mentioned, and those which reverse upon finding in the record (usually in the verdict) some clear indication of jury prejudice which can be related to the knowledge of insurance. *Guardado v. Navarro*, a recent Illinois appellate opinion, illustrates the first category. “[T]he matter was dwelt upon unduly,” the court said, “for the apparent purpose of gaining a prejudicial advantage.”³⁰ The South Dakota court once heard the lawyer for a plaintiff-appellee say that he repeatedly referred to insurance simply to advise the jury that he did not, on that account, want them to increase their verdict. If that were true, the court said, “it is difficult to understand just why he was so continually calling the jury’s attention to the fact.”³¹ The no-repeated-references standard, besides its tacit assumption that the average juror will not get an idea until a brick house falls on him, encourages the worst kind of by-play during trial.³² But it keeps good company; the

25. *Moniz v. Bettencourt*, 24 Cal. App. 2d 718, 76 P.2d 535 (Dist. Ct. App. 1938).

26. *Coe v. Van Why*, 33 Colo. 315, 80 Pac. 894 (1905); *Martin v. Lilly*, 188 Ind. 139, 121 N.E. 443 (1919); *Chernick v. Independent Am. Ice Cream Co.*, 66 Misc. 177, 121 N.Y. Supp. 352 (Sup. Ct. 1910); *Bacon v. Wass*, 200 Okla. 581, 198 P.2d 423 (1948); *Yeast v. Sims*, 122 Okla. 200, 253 Pac. 504 (1927); *Coon v. Manley*, 196 S.W. 606 (Tex. Civ. App. 1917).

27. *Muehlebach v. Mercer Mortuary & Chapel, Inc.*, 93 Ariz. 60, 378 P.2d 741 (1963), adopting the holding of *Causey v. Cornelius*, 164 Cal. App. 2d 269, 330 P.2d 468 (Dist. Ct. App. 1958); see *McCORMICK* 356-57.

28. *Waid v. Bergschneider*, 94 Ariz. 21, 381 P.2d 568 (1963).

29. *William Cameron Co. v. Downing*, 147 S.W.2d 963 (Tex. Civ. App. 1941); cf. *Skeeters v. Skeeters*, 389 P.2d 313 (Ore. 1964).

30. 47 Ill. App. 2d 92, —, 197 N.E.2d 469, 474 (1964). See also *Altenbaumer v. Lion Oil Co.*, 186 F.2d 35 (5th Cir. 1950), cert. denied, 341 U.S. 914 (1951).

31. *Kloppenburg v. Kloppenburg*, 66 S.D. 174, 176, 280 N.W. 209, 210 (1938).

32. *Martin v. Pacific Gas & Elec. Co.*, 204 Cal. App. 2d 316, 22 Cal. Rptr. 291 (Dist. Ct. App. 1962); *Seals v. Sharp*, 31 Tenn. App. 75, 212 S.W.2d 620 (1948).

Supreme Court's recent reversal in *Tipton v. Socony Mobile Oil Co.*³³ is apparently attributable to the fact that workmen's compensation insurance was mentioned repeatedly in the trial; the repetition required disagreement with the court of appeals' finding of harmless error.

The second substitute for the no-mention-at-all standard is a principle that insurance information justifies reversal only where prejudice is apparent. If the court can conclude reasonably that the result would have been the same had there been no mention of insurance, it affirms despite the corrupted record.³⁴ If the liability issue was close, and there are other indications that insurance influenced the result, it reverses.³⁵ In *Skeeters v. Skeeters*,³⁶ for instance, the Oregon court had before it two kinds of insurance, accident insurance covering the plaintiff, and liability insurance covering the defendant. Only one insurer was hidden; the fact of accident insurance had been pleaded in answer and was proved in evidence. With one insurer clearly in the case, the court plausibly concluded that ominous, general questions about insurance (*e.g.*, "Do you feel that an insurance representative, in dealing with the party who is insured, should be honest and tell the truth in their dealings?") were not enough to inform the jury of liability insurance. Prejudice was unlikely—a conclusion which appears in a number of appellate opinions in this area.³⁷

The discovery of prejudice at the trial stage by the appellate court in its remote sanctuary is an approximate science. The most popular method is an examination of the verdict, but the relation between illegitimate information and the verdict is not always conclusive. The Alabama court, for instance, had before it a plaintiff's lawyer who had asked a witness about the defendant's \$10,000 worth of insurance. The jury had returned a verdict for the plaintiff for \$10,000, but the court thought it would have to indulge in "mindreading or some other mystical medium"³⁸ before it could say that the question produced the

33. *Tipton v. Socony Mobil Oil Co.*, 375 U.S. 34 (1963), reversing 315 F.2d 660 (5th Cir. 1963).

34. *Connelly v. Nolte*, 237 Iowa 114, 21 N.W.2d 311 (1946); *Hager v. Bushman*, 255 App. Div. 934, 8 N.Y.S.2d 725 (1938), rehearing denied, 10 N.Y.S.2d 217 (1939); *Halepeska v. Callihan Interests, Inc.*, 371 S.W.2d 368 (Tex. 1963).

35. *Messinger v. Karg*, 48 Ohio App. 244, 192 N.E. 864 (1934); the court was heavily influenced by the fact that the case had been tried once before with an opposite verdict.

36. 389 P.2d 313 (Ore. 1964).

37. Authorities cited notes 27 and 28 *supra*; *Jones v. Cary*, 219 Ind. 268, 37 N.E.2d 944 (1941); Annot., 4 A.L.R.2d 761, 792-98, 821 (1949); Walker, *The Problem of Indemnity Insurance in Damage Actions as Answered by the Courts of California*, 11 So. CAL. L. REV. 407 (1938).

38. *Burnett v. Bledsoe*, 159 So. 2d 841, 843 (Ala. 1964). Compare *Colquett v. Williams*, 264 Ala. 214, 222, 86 So. 2d 381, 388 (1956), where the same court said:

[N]either retraction nor rebuke would have destroyed the strongly prejudicial sug-

verdict. Other courts, on much less convincing indications of prejudice, would have reversed.³⁹ An occasional record presents indications other than the verdict that the jury did not appear to have been influenced by the fact of insurance. In *Galotti v. Deansboro Supply Co.*, the jury requested that certain portions of the testimony be re-read to them, and the New York court thought this proof enough "that the jury were giving serious consideration to the merits of the case."⁴⁰ Of course, reliance on appearance may be dangerous. If the average juror can detect insurance in the case without a brick house falling on him, he may also be able to reason that he had best play the game and not mention what cannot be mentioned to him, nor even appear to have thought about it.⁴¹

Some of the authority on illegitimate insurance information holds that no amount of therapy can cure the prejudice.⁴² This is a sample of historic realism that has broken under the weight of personal injury litigation,⁴³ although the principle still survives in a few opinions.⁴⁴ Others, which hold that the trial judge's failure to instruct was reversibly erroneous, reject it by negative inference.⁴⁵

The *Skeeters* opinion indicated that the fact of insurance is not prejudicial if it comes into the trial legitimately, *e.g.*, where an insurer is a party.⁴⁶ If admissible evidence unavoidably indicates that an insurer is a hidden litigant in the case, the disclosure will not render the evidence inadmissible.⁴⁷ If the party interested in keeping the litigant

gestions that it was an insurance company and not appellants who should and would have to pay for appellee's injuries.

39. *Indian Ref. Co. v. Crain*, 280 Ky. 112, 132 S.W.2d 750 (1939); *Messinger v. Karg*, 48 Ohio App. 244, 192 N.E. 864 (1934). The standards are similar to those applied in cases where affirming the damage verdict is conditioned on accepting a reduced amount. See *James, Remedies for Excessiveness or Inadequacy of Verdicts*, 1 DUQUESNE L. REV. 143 (1963).

40. 248 App. Div. 20, 24, 289 N.Y. Supp. 535, 540 (1936).

41. See Broeder, *supra* note 6, which indicates that, although jurors consider liability insurance, and award higher damage verdicts when they know about it, they observe the court's instruction not to talk about it in the jury room. An interesting and unscientific report on the same subject is Amandes, *From Voir Dire to Verdict Through a Juror's Eyes*, 9 PRAC. LAW. 21 (No. 6, 1963), but Professor Amandes appears not to have considered the possibility that jurors depart from instructions without appearing to do so.

42. *Colquett v. Williams*, 264 Ala. 214, 86 So. 2d 381 (1956); *Davis v. F. M. Stamper Co.*, 347 Mo. 761, 148 S.W.2d 765 (1941).

43. *Jones v. Cary*, 219 Ind. 268, 37 N.E.2d 944 (1941); *Marshall v. Meade*, 23 Misc. 2d 162, 201 N.Y.S.2d 188 (Sup. Ct. 1960).

44. *Colquett v. Williams*, 264 Ala. 214, 86 So. 2d 381 (1956). *But see* *Burnett v. Bledsoe*, 159 So. 2d 841 (Ala. 1964).

45. *Davis v. F. M. Stamper Co.*, 347 Mo. 761, 148 S.W.2d 765 (1941).

46. *Price v. King*, 122 N.W.2d 318 (Iowa 1963).

47. *Berryman v. Bayshore Constr. Co.*, 24 Cal. Rptr. 380 (Dist. Ct. App. 1962) *aff'd*, 207 Cal. App. 2d 331; *Gigliotti v. United Illuminating Co.*, 193 A.2d 718 (Conn. 1963); *Lilly v. Metropolitan Life Ins. Co.*, 318 Pa. 248, 177 Atl. 779 (1935); *McCORMICK* at 356; *Annot.*, 94 A.L.R.2d 826, 833-41 (1964).

hidden first suggests insurance—typically in questions on a statement given by one of the parties to an insurance adjuster—the other party is entitled to explore the subject, even though the exploration tears the veil of obscurity from an insurance company.⁴⁸ Finally, if both parties have suggested insurance, a general principle of invited prejudice will operate to estop either from complaining about a prejudiced verdict.⁴⁹

The problem of hiding liability insurers has produced, from impressive scholars of evidence, at least three policy approaches:

1. The “open it up” school, led by the late Professor Charles McCormick, who accurately predicted, in 1938, that “hard rules of exclusion will soften into standards of discretion to exclude,”⁵⁰ just as hard rules of reversal for misconduct have softened into rules which only permit reversals for prejudice. He takes the position in his popular treatise on evidence that jurors in modern trials assume that the defendant is protected by liability insurance and that mention of it is probably harmless:

The truth will out, and the results are extensive arguments on appeal upon elusive questions of prejudice and good faith, and a considerable number of reversals and retrials. The heart of the policy of non-disclosure is really surrendered when the jurors are allowed to be examined upon their connection with insurance companies.⁵¹

Whatever merit this school of thought has, and it has its supporters,⁵² it appears not to have considered the fact that the typical these-are-the-only-parties trial court instruction,⁵³ or the same confusion introduced in the defendant’s voir dire questions, may reverse in the jurors’ minds the assumption that the defendant is insured. The “open it up” argument, in any event, is little help to trial judges, who must live with the appellate rules on the subject.

48. *Wills v. J. J. Newberry Co.*, 43 Cal. App. 2d 595, 111 P.2d 346 (Dist. Ct. App. 1941); *Kickels v. Fein*, 104 Ind. App. 606, 10 N.E.2d 297 (1937); *Neill v. McGinn*, 175 Neb. 369, 122 N.W.2d 65 (1963); *Stygles v. Ellis*, 123 N.W.2d 348 (S.D. 1963) (and cases cited by the South Dakota court).

49. See the discussion of invited prejudice in Part II, *infra*.

50. McCormick, *Tomorrow's Law of Evidence*, 24 A.B.A.J. 507, 580 (1938).

51. MCCORMICK 358.

52. *Causey v. Cornelius*, 164 Cal. App. 2d 269, 330 P.2d 468 (Dist. Ct. App. 1958).

53. *Miller v. Alvey*, 194 N.E.2d 747, 749 (Ind. App. Ct. 1963), involved this instruction: You are instructed that Katherine Miller and Herman Miller are the only plaintiffs and Russell Alvey is the only defendant in this cause of action, and there is no evidence in this case there is any other party, plaintiff or defendant, interested in its outcome.

The appellate court held the instruction justified because mention of insurance had been made and there had been introduced into evidence a release agreement negotiated by an insurance adjuster.

2. The .neo-hush-hush school (to update Professor McCormick's phrase⁵⁴), which attempts to accommodate the earliest judicial responses on this question to the demands of modern trial dockets. This policy position requires that trial judges do all they can to minimize the effect of mentions of insurance and avoid any comments, or even therapeutic instructions, which might "magnify the matter and perhaps lead the jurors to believe that insurance is a material consideration."⁵⁵ Judge William Bliss' brick house remark⁵⁶ is a witty expression of this point of view. Even though the judge does everything he can to keep the hidden litigant behind the veil that law provides him, he cannot in all cases keep the influence of insurance from reaching the jury—unless he is willing to give an instruction which implies that, despite voir dire questions and casual suggestions from the plaintiff's lawyer, the defendant really is not insured.

3. The "explain it away" school, represented by the late Dean Wigmore. "Any one who will study the opinions of Supreme Courts," he wrote, "can satisfy himself that the permission to the trial judge to express his opinion on matters of evidence would remove a large part of the supposed harm done by trifling transgressions of the rules of Evidence, and would thus remove much of the abuse of new trials." He gives a convincing example:

A policeman, on a murder trial, telling about the bloody hatchet he found, is asked, "Was it human blood?" and the answer gets in. "Yes, it looked to me like human blood."

Instead of ordering a new trial because the jury *might* give to this layman's guess a value which it does not have, why not let the trial judge say to the jury in his charge: "You need not pay any attention, gentlemen, to the policeman's notion about the blood being human. He knows nothing about the difference between different kinds of blood. He is no expert in blood. You heard chemists here, on both sides, testify from their analyses and give their reasons and scientific processes. Decide from their testimony. Do not mind what the policeman thought."⁵⁷

Dean Wigmore chose his example carefully; this fatherly advice would have less effect in a case involving insurance, because here the policy of the law is to keep from the jurors' knowledge a probative, influen-

54. MCCORMICK 357.

55. *Dennis v. Hulse*, 362 S.W.2d 308, 309 (Tex. 1962); see *Smith v. St. Lawrence County Nat'l Bank*, 18 App. Div. 2d 1042, 238 N.Y.S.2d 585 (1963); *Verdi v. Saporita*, 34 Misc. 2d 10, 226 N.Y.S.2d 29 (Sup. Ct. 1962); *Morgan v. Robinson*, 3 App. Div. 2d 216, 159 N.Y.S.2d 639 (1957); Annot., 77 A.L.R.2d 1154 (1961).

56. *Connelly v. Nolte*, 237 Iowa 114, 21 N.W.2d 311 (1946).

57. 1 WIGMORE, EVIDENCE 251 (3d ed. 1940).

tial fact, not a piece of evidence which is excludable because it lacks trustworthiness.⁵⁸ The "don't think about it" advice is less convincing in this situation,⁵⁹ and Dean Wigmore probably realized it when he suggested that no final solution to the problem of fair trials is likely until something is done by the profession about "the constant partisan zeal, the lurking chicanery, the needless unpreparedness, of counsel."⁶⁰ He lamented, a generation ago, that the trial lawyer was throwing away his professional dignity:

How disgraceful and degraded it commonly is, we seldom pause to reflect. And its worst feature is that it has dragged down our most accomplished and highminded practitioners to employ their talents in this ungentlemanly spectacle.⁶¹

B. *Innuendo: The Cline Case*⁶²

In 1953, Melvin Cline, 56, a Chicago salesman, was injured when struck by a Kirchwehm Brothers' truck while he was crossing a Chicago street. Cline was hit as he stepped from behind an illegally parked truck owned by M. A. Soper Company. Cline sued both Kirchwehm and Soper in a superior court in Chicago; the first trial ended in mistrial; in the second Cline recovered \$30,000 in damages.

Cline's ordeal of medical treatment began with relatively routine orthopedic surgery in 1953 and has not yet ended. His injuries were at first a fractured arm and shoulder; he now has an immobile, useless and painful arm and shoulder. His treatment included the efforts of four doctors, examination by several others and seven hospitalizations

58. See *Cross v. State*, 68 Ala. 476 (1881).

59. Although *Nappi v. Falcon Truck Renting Corp.*, 286 App. Div. 123, 141 N.Y.S.2d 424 (1955), *aff'd mem.*, 1 N.Y.2d 750, 152 N.Y.S.2d 297 (1956), appears to support the Wigmore thesis even in this situation. However, note Judge Bostow's strong dissenting opinion and the authorities he cites.

60. 1 WIGMORE, EVIDENCE 262 (3d ed. 1940).

61. *Id.* at 266. See Wigmore, *A Program for the Trial of Jury Trial*, 12 J. AM. JUD. Soc'y 166, 167-68 (1929), and Part III-D, *infra*.

62. An abstract of this opinion is published, *Cline v. Kirchwehm Bros. Cartage Co.*, 42 Ill. App. 2d 85, 191 N.E.2d 410 (1963), but most of the data on which this discussion is based has not been published. It was supplied to the author by Mr. James A. Dooley, of the Chicago Bar, who was Melvin Cline's counsel. It includes: a letter to the author from Mr. Dooley, dated January 7, 1964 [hereinafter cited as "Dooley Letter"]; the Brief and Argument for Plaintiff-Appellant [hereinafter cited as "Cline Brief"]; a transcript of record in support of Cline's position [hereinafter cited as "Cline Transcript"]; the Brief and Argument of M. A. Soper Co., defendant-appellee and cross-appellant [hereinafter cited as "Soper Brief"]; the Brief and Argument for Kirchwehm Bros. Cartage Co., defendant-appellee; an abstract of record in support of the position of M. A. Soper Co.; the Brief and Argument for Cline in opposition to the Soper cross-appeal; and the Reply Brief for Cline.

Copies of the unpublished opinion, General Docket No. 48714, First District, Third Division, Appellate Court of Illinois [hereinafter cited as "Court's Opinion"] were furnished to the author by Mr. Dooley and by Callahan & Co., the publisher of the official Illinois appellate opinions.

—five of them for surgery and one, of six weeks duration, for hepatitis caused by a bone-grafting operation.

Taking what his lawyer called the "long draw,"⁶³ Cline filed for a new trial, lost that motion and then appealed from the \$30,000 verdict to the Appellate Court of Illinois. He contended that the jury's award was inadequate and asked for a new trial limited to the issue of damages. (His evidence indicated special damages totalling \$114,000 and testimony indicated a permanent loss of income as well as past and future pain and suffering.⁶⁴) Cline's brief, in pertinent part, contended that the jury had been influenced by the improper conduct of both defendants' attorneys. "The pattern of defense," his brief said, "sought to confuse the jury with a welter of collateral, irrelevant and improper matters"⁶⁵—pointing to precedent which reversed at the behest of a plaintiff for a "pattern of misconduct which runs through the case."⁶⁶

Specifically, Cline's brief relied on four kinds of misconduct, all of them substantially constituting innuendo or suggestions to the jury: (1) that much of Cline's difficulty dated from injury pre-existing the accident at issue; (2) that Cline had received incompetent medical care; (3) that a fall Cline had when on the way to visit one of his numerous physicians was the real cause of non-union of his fracture; and (4) that Cline's trial testimony was at variance with what he said during a pretrial deposition.⁶⁷ Questions in all of these areas had been ruled improper by the trial judge.⁶⁸ As Cline's brief said, persistent efforts to introduce testimony which is probably inadmissible or upon which the trial judge has already ruled puts the opponent at a double-edged disadvantage:

First, it permits a party to get before the jury the facts it has no right to prove; second, it puts the objecting party in the position of having to make repetitious objections, thus implanting in the minds of the jurors that there is something unfavorable in such evidence.⁶⁹

63. Dooley Letter.

64. *Cline v. Kirchwehm Bros. Cartage Co.*, 42 Ill. App. 2d 85, 191 N.E.2d 410 (1963).

65. Cline Brief p. 21.

66. *Ibid.*; see notes 91 and 92 *infra*.

67. Cline Transcript.

68. *Ibid.* In most of the instances which were relied upon by the appellate court in reversing, the trial judge had sustained objections or stricken testimony; however, in these instances, he was not asked to instruct the jury to disregard. When he was asked to do that, he did it. Mr. Dooley, and most trial lawyers, take a dim view of the efficacy of therapeutic instructions. Dooley letter:

You make reference to the question of whether the errors were cured by instructions. A real error is never cured by the court's instructions. As the old lady on the jury said, "The court may say 'strike it,' but I am listening to everything I hear and remembering it too."

69. Cline Brief p. 25.

To illustrate his point, Cline pointed to several series of questions which suggested illegitimate defenses to the jurors, and which forced Cline's lawyer to assume repeatedly the role of an obstacle to the presentation of the facts:

1. After the trial judge ruled improper certain questions concerning an X-ray not presented for admission into evidence, Kirchwehm's counsel attempted three times to elicit information on the X-ray and forced Cline's attorney to object.⁷⁰ In addition Soper's counsel went into the same subject after Kirchwehm's attorney, again forcing objections.⁷¹

2. On three occasions, the defendants' lawyers attempted to explore an eye injury Cline had suffered before the accident at issue, and in each case the trial judge sustained objections to the questions.⁷²

3. Defense attorneys also attempted two series of questions on treatment for a hernia Cline had had two years before the accident at issue. In one of these exchanges, defense counsel appears to have defied the court's ruling on the subject.⁷³ Similar questions, centered on a heart attack Cline had before the litigated accident, and attempts to admit inadmissible hospital records again cast his lawyer in the role of suppressor of evidence.⁷⁴

4. Finally, repeated improper impeaching questions suggested to the jury that Cline himself had changed his story between the time of a pretrial deposition and the trial. Most of these questions were objected to and objections to them were almost invariably sustained.⁷⁵

Although Cline's brief did not detail the instances of precautionary instructions, the abstract of record he filed with his brief indicated that the trial judge, in a relatively perfunctory manner, had instructed the jury to disregard improper questions and comments.⁷⁶

Both defense briefs on appeal relied on improper conduct by Cline's lawyer and on the contention that defense tactics were justified in the circumstances. Both defendants also contended that the jury verdict was justified by the evidence and, if it was not, that the inadequacy was the result of a compromise on liability. If a compromise on liability is indicated in the record, Illinois precedent requires a new trial on all issues and will not permit a new trial confined only to the

70. Cline Brief; Cline Transcript.

71. *Ibid.*

72. *Ibid.*

73. Cline Transcript p. 78.

74. Cline Brief p. 28: "With no holds barred, and without much more than pretense at refreshing recollection, the contents of inadmissible hospital records were detailed for the jury in a manner that cast the plaintiff in the role of suppressor of evidence."

75. Cline Brief; Cline Transcript; Dooley Letter.

76. See note 68 *supra*.

damages issue.⁷⁷ Soper also appealed for a reversal of the trial court's judgment, contending that it was not negligent in parking its truck where it did.⁷⁸

The appellate court reversed and ordered a new trial on the damages issue. In an unpublished opinion written by Justice McCormick, the court sustained Cline's position that improper defense tactics had prejudiced the jury against him.⁷⁹ The court initially noted that an injured plaintiff does not insure the competence of the physicians he hires to treat him. If he "exercises ordinary care in employing a medical practitioner and the practitioner by reason of malpractice aggravates the original injury, the original tort-feasor is liable for the aggravation."⁸⁰ In the absence of evidence of Cline's negligence in choosing his physicians, any testimony directed at their competence would have been improper. In any case, "the defendants did not introduce evidence to challenge the competency of these men, nor did the evidence in the record show that the procedures followed by them were not in accordance with proper medical procedure."⁸¹ The court then carefully detailed the questions which, according to Cline, injected the illegitimate issue of medical competence into the trial.⁸² The court

77. See Part III-C, *infra*.

78. Soper Brief.

79. The court also ruled in Cline's favor as a matter of law as to Soper's contention that it had not been negligent.

80. Court's Opinion p. 18.

81. *Id.* at 19.

82. Because the opinion was not published, the quotation of substantial parts of it in these notes seems justified. *Id.* at 19-21;

In the cross-examination of the physicians attending the plaintiff counsel for both defendants attacked the experience of the attending doctors with reference to their treatment of the fractured humerus. They questioned whether the doctors had experience in the use of intramedullary pins and suggested that the use of these pins was improper. They attempted to show that the doctor had failed to remove the scar tissue, and they suggested that the scar tissue should have been subjected to a pathological study, that the cast had been removed too soon, and that the doctor was remiss in not protecting the blood transfusion procedures through which the plaintiff acquired hepatitis. An attempt was made to show that the several operations were unnecessary because of improper operative procedure. Again it was suggested that the nonunion was caused by the premature removal of the fixation process. All of these questions were objected to and the objections were sustained by the court.

During the cross-examination both counsel for Kirchwehm and counsel for Soper persisted in attacking the competency of the attending doctors and in many instances disregarded the court's ruling on objections. In one instance counsel for Kirchwehm, after the court had ruled that he might call the doctor's attention to the hospital records without asking him to state the contents thereof, asked the doctor as to whether, having looked at his records, his memory was refreshed as to whether or not a fracture line was evident in that x-ray. The court said: "No, you are doing just the thing I told you not to do. Strike it out, and the jury will disregard it." In cross-examination of a doctor by counsel for Soper the doctor was asked the following question: "Doctor, if there were sufficient force to cause such a piece of bone to detach itself by a fracture, that could be instrumental in causing a nonunion could it not?" Objection was made and sustained by the court. Counsel again asked in substance the same question, which was again objected to, and the objection was sustained. Counsel then asked the following question: "I believe counsel asked you

also noted that the foundation, or attempted foundation, for questions going to aggravation of Cline's injury by his subsequent fall was not strong enough to justify inserting that issue into the case.⁸³

The questions on pre-existing conditions were also detailed by the court;⁸⁴ all of these, Justice McCormick wrote, were improper under settled precedent in Illinois, because the plaintiff was not suing for aggravation of previous injury.⁸⁵ After laying this basis from the record, his opinion moved into a candid judgment as to the conduct of the defense:

The case was being tried for the defendants by two experienced and competent lawyers. They either knew or should have known what the law was. Objections were repeatedly sustained by the court, and defendants' counsel disregarded the rulings. It is a well known fact that the continual presentation before the jury of questions of this character can be extremely harmful to the plaintiff's case.

The court found similar misconduct as to impeachment questions directed at Cline, and it found Cline's lawyer had not conducted himself to the prejudice of the defendants' case.⁸⁶

The trial judge's rulings on evidence, which were generally affirmed by the appellate court, were not sufficient to cure the prejudice which Cline suffered during trial. The court did not take note of the repeated instances in which the trial judge had not only sustained objections, but had cautioned the jury, sometimes at the request of Cline's lawyer, to disregard the prejudice.⁸⁷ The issue, Justice McCormick wrote, is whether the defendants' conduct deprived the plaintiff of a fair trial. The court held that it did. "When the defendants brought before the jury, by means of improper questions, matters which were

about subsequent injury to a person who has had a fracture of the humerus. Doctor, a fall onto the left arm such as you saw on your x-rays, that could be such a subsequent injury as to materially affect the healing of that fracture?" The question was objected to and the court said: "Counsel, you are back on the same road you were on before." Counsel replied: "That's right, your Honor." The court: "Sustained."

83. *Id.* at 21:

It has been held that where there was an injury which was aggravated by a subsequent accident the subsequent accident might be considered as flowing from the original injury. 15 Am. Jur. Damages, sec. 87. Also see annotation, 9 A.L.R. 255. However, in this case the questions were improper without considering the rule above mentioned since there was definite evidence in the record that before the plaintiff had left for Iowa City there was a nonunion of the humerus, loss of calcium and dissolution at the bone ends of the fracture.

84. Court's Opinion p. 21-22.

85. Court's Opinion p. 24:

The questions asked in this examination concerning his previous disease were not asked for that purpose, nor was there any attempt on the part of the plaintiff to recover on this theory. Hence the questions were totally immaterial.

86. *Id.* at 24-26.

87. Cline Transcript.

immaterial and prejudicial, and persisted in such conduct so as to create a definite pattern in the case, they were depriving the plaintiff of a fair trial on the question of damages."⁸⁸ The \$30,000 verdict was not the result of jury compromise, but the result rather of "a deliberate attempt on the part of counsel for the defendants to improperly bring matters before the jury which would cause them to return a verdict in an amount less than adequate compensation."⁸⁹

In 1963, ten years after the accident, Cline, for the third time, presented his damages case to a jury in Chicago. The verdict was \$121,400.⁹⁰

There is ample recent precedent in Illinois for recognizing both the insidious prejudice of forcing an opponent to obstruct the introduction of irrelevant testimony⁹¹ and the harmful effect of improper impeaching questions.⁹² The same sort of recognition of the corrosive force of innuendo has been made in other jurisdictions.⁹³ In an Oklahoma case of last year, for instance, the examining lawyer asked a police officer whether one of the parties had done anything wrong at the accident scene. The court upon objection, excluded the answer, and the examiner then added: "The witness is impartial, as I understand it, and I think the jury is entitled to the benefits of his fairness." The Okla-

88. Court's Opinion p. 27. Mr. Dooley's comments are also worth noting. Dooley Letter: The verdict was the result of common errors committed frequently without censure. These are such matters as:

1. Reference to conditions of health which are in nowise associated with the claim being asserted.
2. Creation of innuendoes in the nature of other accidents, etc., which are never proved. An innuendo is always more difficult to meet than a fact, for proof of a fact usually affords cross-examination.
3. Improprieties in impeachment. Daily, witnesses and parties are cross-examined, not on any matter relevant to the direct examination nor on matters relevant to the issues. The purpose? To contradict them. Thus, a witness might be asked:
Q. Did you have a blue suit on when crossing the street?

A. I don't recall.

The cross-examiner then refers to the deposition in which the witness said his suit was blue. This, of course, is a crass illustration, but nonetheless demonstrative of the proposition.

4. Continuous violation of a ruling of the court by counsel.

89. Court's Opinion p. 30.

90. Dooley Letter; NACCA News Letter, Mar. 1964, p. 43.

91. *Martin v. Miles*, 41 Ill. App. 2d 208, 190 N.E.2d 473 (1963); *Roberts v. Hyland Builders Corp.*, 34 Ill. App. 2d 276, 181 N.E.2d 197 (1962).

92. *Garbel v. Fields*, 36 Ill. App. 2d 399, 184 N.E.2d 750 (1962); *Moore v. Daydif*, 7 Ill. App. 2d 534, 130 N.E.2d 119 (1955); see *People v. Paradise*, 30 Ill. 2d 381, 196 N.E.2d 689 (1964); *Roberts v. Hyland Builders Corp.*, *supra* note 91; *Jacobson v. National Dairy Prods. Corp.*, 32 Ill. App. 2d 37, 176 N.E.2d 551 (1961).

93. *Wills v. J. J. Newberry Co.*, 43 Cal. App. 2d 595, 111 P.2d 346 (Dist. Ct. App. 1941), discussed the connecting-up issue; *Phillips v. Vrooman*, 361 Mo. 1098, 251 S.W.2d 626 (1952), involved suggestion of insurance by innuendo, and the court reversed despite a therapeutic instruction. *But see Ford Motor Co. v. Arguello*, 382 P.2d 886 (Wyo. 1963), which left the question open because "no authority is called to our attention." See also *Berger v. United States*, 295 U.S. 78 (1935).

homa Supreme Court thought this one of several reasons justifying reversal. The court noted:

We have recognized that a party forced to object to an improper question, may by his objection create an inference that the answer to the proffered question would establish a fact adverse to his interest.⁹⁴

II. APPELLATE ESCAPE VALVES

Appellate judges are stubbornly unwilling to send jury cases back for new trial if they can avoid it. This is probably dictated in part by the demands of administration and in part by an honest, if tacit, admission that they are in a poor position to measure prejudice. The expressed reasons for affirming tainted judgments are, however, something less than candid. The devices and excuses which appellate judges use—their “escape valves”—have tended to crystallize, at least for purposes of analysis, into four categories: (1) A new trial is not required because the party complaining of prejudice invited it; (2) A new trial is not required because the party complaining of prejudice failed to object to it during trial; (3) A new trial is not required because the trial judge cured the prejudice with an instruction to the jury to disregard it; and (4) A new trial is not required because the jury was not prejudiced.⁹⁵

A. *Invited Prejudice*

At its most extreme, the rule of invited prejudice says that an appellant cannot complain of a prejudiced jury if he attempted to prejudice the jury himself, regardless of whether his attempt was successful and regardless of whether his attempt was temporally or factually related to that about which he is complaining. In an early Illinois case, for instance, in which an appellant complained of prejudicial jury argument, the court denied reversal because the appellant's lawyer had intimated that the appellee was a convict.⁹⁶ The Michigan court once

94. *Nash v. Hiller*, 380 P.2d 77, 79 (Okla. 1963). See also *Houston v. Pettigrew*, 353 P.2d 489 (Okla. 1960). The California Appellate Court recognized, in 1941, that the impression that a party is suppressing evidence may be fatally prejudicial to him, and condemned, in dicta, attempts to insinuate to the jurors that one of the parties was poor and therefore in need of a damages judgment; *Wills v. J. J. Newberry Co.*, *supra* note 93.

95. To these might be added the good-faith and claim of right doctrines, discussed in Part III-D, *infra*.

96. *Ellsworth v. Cumming*, 134 Ill. App. 397 (1907); see also *Mercer v. Millers Mut. Fire Ins. Ass'n*, 249 S.W.2d 402 (Mo. 1952), where the prejudicial conduct came from the trial judge, but the appellate court refused to reverse because it thought both sides got “an even break”—which ignores the fact that one side might have lost because of prejudice and the other have won in spite of it; *Wiseman v. Skagit County Dairymen's Ass'n*, 172 Wash. 95, 19 P.2d 662 (1933), is a similar case; see also *Yerrick v. East Ohio Gas Co.*, 198 N.E.2d 472 (Ohio Ct. App. 1964); see Annot., 94 A.L.R.2d 826, 851 (1964).

excused a lawyer's prejudicial remark during examination, and refused to grant a new trial, because the witness being examined had provoked the remark.⁹⁷

The seed of logic in the invited prejudice principle is that, if both parties are responsible for the prejudiced jury, the losing party cannot obtain a new trial for something that was substantially his doing. The Wisconsin court, for example, assessed a record before it as containing a mutually and "unduly belligerent attitude on the part of counsel" and "caustic repartee" but, because both parties were responsible for prejudice, if there was prejudice, "neither party is in a position to avoid the results of the trial."⁹⁸ The logic of joint responsibility is more apparent when the prejudice involved comes from a single incident for which the complaining party is substantially responsible.⁹⁹ When liability insurance is mentioned by a plaintiff's lawyer, for instance, the defendant's vociferous objections and suggestive asides (that there is no insurance) may be held to bar him from complaining of the prejudice.¹⁰⁰ *Jaffray v. Hill*¹⁰¹ is another kind of recent example. The issue there was a civil suit for damages for assault and battery, which requires, under Illinois law, a special finding of malice in the defendant. The defendant's lawyer argued to the jury that their finding the defendant malicious could send him to jail; the plaintiff's lawyer, in reply, told the jury he was not asking for a finding of malice. On appeal, from judgment for the plaintiff, the defendant argued that the plaintiff's statement was a waiver of an element essential to liability. The court held the argument to be an "appropriate answer."

The response to the invitation, of course, can be too potent; a you-ought-not-bilk-this-poor-man statement from a personal injury defense lawyer may not in every case justify the we're-only-after-his-insurance-company reply.¹⁰² Judge Bliss called this sort of thing "flame-throwing,"¹⁰³ and the Kansas court said "it is not always safe to follow an opponent . . . into forbidden territory."¹⁰⁴ The thrust of these prece-

97. *Muncie Wheel & Jobbing Co. v. Finch*, 150 Mich. 310, 113 N.W. 1107 (1907).

98. *Sandeen v. Willow River Power Co.*, 214 Wis. 166, 181, 252 N.W. 706, 712 (1934).

99. *City Transp. Co. v. Sisson*, 365 S.W.2d 216 (Tex. Civ. App. 1963); *Newspapers, Inc. v. Love*, 367 S.W.2d 185 (Tex. Civ. App. 1963), and cases cited in the opinion; *Texas Sand Co. v. Shield*, 367 S.W.2d 88 (Tex. Civ. App. 1963).

100. *Big Ledge Copper Co. v. Dedrick*, 21 Ariz. 129, 185 Pac. 825 (1919); *Santee v. Haggart Constr. Co.*, 202 Minn. 361, 278 N.W. 520 (1938).

101. 41 Ill. App. 2d 470, 191 N.E.2d 399 (1963).

102. *Colquett v. Williams*, 264 Ala. 214, 86 So. 2d 381 (1956); *Davis v. F. M. Stamper Co.*, 347 Mo. 761, 148 S.W.2d 765 (1941). But see *Waid v. Bergschneider*, 94 Ariz. 21, 381 P.2d 568 (1963) and early Missouri cases distinguished in the *Davis* opinion.

103. *Connelly v. Nolte*, 237 Iowa 114, 131, 21 N.W.2d 311, 319 (1946).

104. *Pool v. Day*, 141 Kan. 195, 203, 40 P.2d 396, 401 (1935).

dents, however, is not a rejection of the general principle of invited prejudice. Both Judge Bliss and the Kansas court endorsed the principle but recognized that it has its limits. The escape valve is left intact.

If the complaining party was the original source of the prejudicial fact, he probably cannot succeed in obtaining a new trial because of the prejudice flowing from that fact. Insurance, again, is the commonest example. If the defendant indicates the veiled litigant, typically through examining one of the parties on a statement given to an insurance adjuster, the plaintiff may be entitled to explore the issue without risking a new trial on the reasoning that the jury already has been prejudiced.¹⁰⁵ The same principle ought to apply to any sort of irrelevant and prejudicial information.¹⁰⁶ But the appellee's capitalization on facts first introduced by the appellant has to have borne some proportion to the magnitude of the appellant's slip. An inadvertent mention of insurance by a defendant's witness, for example, does not justify a full-scale exploration of insurance by the plaintiff.¹⁰⁷

Cases where the prejudice originates in probative evidence are logically distinct, although appellate opinions sometimes talk as if the unfortunate side of a provable fact is a species of invited prejudice. In *Fields v. Creek*,¹⁰⁸ the personal injury plaintiff gave an accident report to the insurer. The defense lawyer attempted to impeach the plaintiff with this report. On re-direct the plaintiff's lawyer established that the report was not a report to a friendly third-party because both sides had the same insurer. Although the court affirmed a judgment for the plaintiff and talked about invited prejudice, this was a case involving the prejudicial side of a fact properly before the jury. In *Neil v. McGinn*,¹⁰⁹ a property damage case, the salvage value of the articles damaged was a necessary part of the defendant's case. In proving it his lawyer established that the plaintiff was insured against her loss. The Supreme Court of Nebraska, overruling a trial judge's order for a new trial, found unavoidable prejudice.

The invited prejudice principle rarely rises above the status of escape

105. *Wills v. J. J. Newberry Co.*, 43 Cal. App. 2d 595, 111 P.2d 346 (Dist. Ct. App. 1941); *Marshall v. Meade*, 23 Misc. 2d 162, 201 N.Y.S.2d 188 (Sup. Ct. 1960); see *Brown v. McCuan*, 56 Cal. App. 2d 35, 132 P.2d 838 (Dist. Ct. App. 1942), where the jury learned about insurance coverage from the introduction into evidence of medical bills addressed to an insurance company.

106. *People v. McElroy*, 196 N.E.2d 651 (Ill. 1964), involved a criminal defendant who contended on direct examination that he did not sell or use narcotics; the court held that cross-examining him on drug addiction was proper, even though, absent his statements on direct, addiction was not at issue.

107. *Seminole Shell Co. v. Clearwater Flying Co.*, 156 So. 2d 543 (Fla. Dist. Ct. App. 1963).

108. 21 Wis. 2d 562, 124 N.W.2d 599 (1963).

109. 175 Neb. 369, 122 N.W.2d 65 (1963).

valve. Appellate judges do not discuss it as a right of the prejudiced party to reply in kind, except to explain that the reply in kind did not create reversible prejudice in the jury. *Cook v. Latimer* is the only discovered recent case which elevates this escape valve to the dignity of a right in the party harmed by the prejudice. The plaintiff's lawyer there stated in his opening statement that the plaintiff was a widow; her marital status was irrelevant. The defense lawyer objected at the time, and later offered to prove that the plaintiff had received a substantial sum of money on the occasion of her being widowed, which was also irrelevant. The trial judge refused to allow proof of the unrelated award to the widow; the Alabama Supreme Court reversed, finding a right in the defendant to prove an irrelevant fact in response to the plaintiff's irrelevant statement to the jury: "Where the first illegal evidence is highly prejudicial, the opponent should be allowed to reply as a matter of right to erase from the minds of the jurors the first illegal evidence."¹¹⁰ No doubt trial judges often permit what this trial judge refused to permit, and appellate courts find such refusals within the trial court's discretion, but aside from this one recent case, there appears to be virtually no respect given the invited prejudice rule except as an appellate escape valve.

Several courts have rejected or refused to use the invited prejudice excuse for affirming a prejudiced verdict. Some of the cases reject the principle, but recognize that the prejudice on the juror's mind may have been affected for the better by the fact that harmful information came from both sides. *Eizerman v. Behn*¹¹¹ is illustrative; the appealing lawyer, the Illinois court thought, had engaged in repeatedly prejudicial tactics all during trial. The defending lawyer's occasionally improper rejoinders were not enough to justify reversal, not because of invited prejudice, but because prejudice from the other direction was obviously more flagrant.

Illinois had already rejected invited prejudice as a principle. In *Crutchfield v. Meyer*, the court decided it was more realistic to look at the fact of prejudice aside from whether it had been invited or not; the goal, the court said, is a fair trial:

The offsetting of one impropriety by another may be an efficient method of arbitration, but in the conduct of a trial this court is

110. *Cook v. Latimer*, 274 Ala. 283, 287, 147 So. 2d 831, 834 (1962). But see *Williams v. City of Anniston*, 257 Ala. 191, 58 So. 2d 115 (1952), where the same court refused to recognize a right to meet prejudice with prejudice.

111. 9 Ill. App. 2d 263, 132 N.E.2d 788 (1956); see also *Seminole Shell Co. v. Clearwater Flying Co.*, 156 So. 2d 543 (Fla. Dist. Ct. App. 1963).

concerned with the question of whether or not the defeated party received a fair trial.¹¹²

The Kansas court, somewhat less emphatically, indicated its dissatisfaction with the principle in 1935.¹¹³ And Judge Bliss' opinion, in *Connelly v. Nolte*,¹¹⁴ while implicitly accepting the principle in cases where invitation and reply arise out of the same incident, expressed some skepticism of "flame-throwing" in other circumstances. There are some isolated examples of appellate opinions where the invited prejudice escape valve was not used. In *Paul v. Drown*,¹¹⁵ the plaintiff's lawyer asked the defendant if he had been arrested for reckless driving; the defense lawyer, in the jury's presence, offered to prove that he had not been; the court held this reversibly prejudicial to the plaintiff who started the colloquy. In *Messinger v. Karg*, the defendant's lawyer, in a guest case, said: "I do part company with them when they come into court and when they ask to be compensated by their friends."¹¹⁶ The plaintiff's lawyer then indicated to the jury that the plaintiff was insured. The court reversed a plaintiff's judgment because of the mention of insurance.

B. *Failure to Object*

Best oiled of all the appellate escape valves is the complaining lawyer's failure to make a record in the trial court. This is premised on the reasonable principle that the trial judge must be given an opportunity to correct error (or prejudice) before the appellate court will reverse him for failing to correct it. Its fictional side is an assumption that objection would have accomplished a mitigation of the prejudice,¹¹⁷ and amounts to a failure to realize, or at least to say, that when "error in a trial . . . like a dash of ink in a can of milk . . . cannot be strained out, the only remedy, so that justice may not ingest a tainted fare, is a new trial."¹¹⁸ It may be, as another judge put it, that "the virus has already entered the jurors' minds and cannot be eliminated by a subsequent ruling."¹¹⁹ When that is the case, the principle that the complaining party should have objected is unrealistic; it is based on the fiction that his objection would have accomplished a cure of the prejudice.¹²⁰

112. 414 Ill. 210, 214, 111 N.E.2d 142, 144 (1953).

113. *Pool v. Day*, 147 Kan. 195, 40 P.2d 396 (1935).

114. 237 Iowa 114, 21 N.W.2d 311 (1946); see also the Alabama authorities, *supra* note 110.

115. 108 Vt. 458, 189 Atl. 144 (1937).

116. 48 Ohio App. 244, 246, 192 N.E. 864 (1934).

117. See the empirical data developed in Kalven and Broeder, *op. cit. supra* note 6.

118. *Lobalzo v. Varoli*, 409 Pa. 15, 21, 185 A.2d 557, 561 (1962) (Musmanno, J.).

119. *King v. Chicago, M. & St. P.R.R.*, 138 Iowa 625, 628, 116 N.W. 719, 720 (1908).

120. See dicta in *Utley v. Heckinger*, 235 Ark. 780, 362 S.W.2d 13 (1962).

There are two theories actuating appellate judges when they hold that prejudice has vitiated a verdict so badly that the complaining party's failure to object to it in the trial court does not bar reversal. One is that the trial judge should have intervened on his own motion.¹²¹ It is "the duty of the trial court," this theory goes, "to carefully exclude all highly prejudicial matter from the jury, and admonish the jury to wholly disregard the same in the hope thereby of avoiding a mistrial."¹²² In that case, a fact was involved—the defendant's liability insurance. In a more recent Illinois Appellate holding, the prejudice came from a passion-arousing argument. The court, in reversing for new trial despite the absence of objection, indicated that only aggravated misconduct justifies ignoring the no-objection escape valve:

If prejudicial arguments are made without objection of counsel or interference of the trial court to the extent that the parties litigant cannot receive a fair trial and the judicial process stand without deterioration, then upon review this court may consider such assignments of error, even though no objection was made and no ruling made or preserved thereon.¹²³

Aggravated misconduct apparently includes wilfully unethical behavior.¹²⁴

The other appellate theory justifying reversal even in the absence of a record preserving objection to prejudice turns on a weighing of the evidence. If the issues were so close that the prejudice probably accounts for the verdict, reversal is indicated whether or not there was objection and whether or not the trial judge had a duty to intervene on his own motion in the absence of objection. The measure is applicable in deciding to reverse¹²⁵ as well as in deciding that the verdict was not vitiated by prejudice.¹²⁶ But these are rare cases. The usual attitude is to affirm judgment when no objection was made

121. *People v. Bernette*, 197 N.E.2d 436 (Ill. 1964); see Shaffer, *Bullets, Bad Florins, and Old Boots: A Report of the Indiana Trial Judges Seminar on the Judge's Control Over Demonstrative Evidence*, 39 NOTRE DAME LAW. 20, 33 (1963).

122. *Pool v. Day*, 141 Kan. 195, 200, 40 P.2d 396, 399 (1935).

123. *Belfield v. Coop*, 8 Ill. 2d 293, 313, 134 N.E.2d 249, 259 (1956).

124. See *Swanson v. Evans Oil, Inc.*, 12 App. Div. 2d 875, 209 N.Y.S.2d 860 (1961), where the court relied on the fact that the appellee's lawyer "must be assumed to know" that what he did was improper; *Gordon v. Checker Taxi Co.*, 334 Ill. App. 313, 79 N.E.2d 632 (1948). *Contra*, *Causey v. Cornelius*, 164 Cal. App. 2d 269, 330 P.2d 468 (Dist. Ct. App. 1958); cf. Part III-D, *infra*.

125. *Klotz v. Sears, Roebuck & Co.*, 267 F.2d 53 (7th Cir.), *cert. denied*, 361 U.S. 877 (1959); see also *Cook v. Latimer*, 274 Ala. 283, 147 So. 2d 831 (1962); *Colquett v. Williams*, 264 Ala. 214, 86 So. 2d 381 (1956).

126. *Boop v. Baltimore & O.R.R.*, 118 Ohio App. 171, 193 N.E.2d 714 (1963); *Fields v. Creek*, 21 Wis. 2d 562, 124 N.W.2d 599 (1963).

below and this is so whether the prejudice arose from argument¹²⁷ or from the assertion of an irrelevant fact.¹²⁸ Failure to object is usually fatal.¹²⁹

Not only must the objection be made, it must be made at the time the prejudice occurs,¹³⁰ even if this requires inviting the wrath of the trial judge by objecting to something he does.¹³¹ The Georgia court recently held that the objection has to be renewed after the court's instructions, to record the fact that the complaining party thinks the instructions did not cure the prejudice.¹³² And the objection must be specific enough to inform the trial judge of the prejudice. If it is too broad, the escape valve is still intact;¹³³ if it is too vague, it also fails,¹³⁴ unless the prejudice was so serious that the court's action would not have cured it.¹³⁵ The objector may have to go beyond objection, particularly where the prejudice of which he complains occurred in a voir dire examination or jury speech which is not transcribed by the reporter (in which case he has to get a transcription or at least get the agreement of counsel and the trial judge as to what happened).¹³⁶ If, upon objection, the trial judge defers to the objecting lawyer for a suggestion on curing the prejudice, the lawyer may not preserve his appeal unless he suggests something.¹³⁷ If the objector has recorded his objection to a line of testimony and fails to renew it each time the subject comes up later, he waives his error.¹³⁸ The objector may even

127. *United States v. Johnson*, 331 F.2d 281 (2d Cir. 1964); *Handler v. Eckhouse*, 45 Ill. App. 2d 382, 195 N.E.2d 838 (1964); *Smith v. Musgrove*, 372 Mich. 329, 125 N.W.2d 869 (1964); see also editorial comment at 13 DEFENSE L.J. 291 (1964).

128. *United States v. Spatuzza*, 331 F.2d 214 (7th Cir. 1964); *Boettger v. Babcock & Wilcox Co.*, 253 F.2d 854 (3d Cir. 1958); *Buchanan v. Chicago & N.W. Ry.*, 159 F.2d 576 (7th Cir. 1947); *Grzybowski v. Arrow Barge Co.*, 177 F. Supp. 568 (D. Md. 1959); *Riolfo v. Market St. Ry.*, 78 Cal. App. 2d 385, 177 P.2d 753 (Dist. Ct. App. 1947); *Handler v. Eckhouse*, 45 Ill. App. 2d 382, 195 N.E.2d 838 (1964); *Stegmann v. Zachariah*, 46 Ill. App. 2d 7, 196 N.E.2d 703 (1964); *Breslin v. Blair*, 249 Ky. 178, 60 S.W.2d 337 (1933); *Hayward v. Richardson Constr. Co.*, 126 Mont. 240, 347 P.2d 475 (1959).

129. *Davenport v. United States*, 260 F.2d 591 (9th Cir. 1958), *cert. denied*, 359 U.S. 909 (1959); *Holmes v. United States*, 134 F.2d 125 (8th Cir. 1943); *Shanowat v. Checker Taxi Co.*, 198 N.E.2d 573 (Ill. App. Ct. 1964); *Marshall v. State*, 5 Tex. Crim. App. 273 (1878); *Carter v. Nelms*, 204 Va. 338, 131 S.E.2d 401 (1963); *Annot.*, 69 A.L.R.2d 1148 (1960).

130. *Kickels v. Fein*, 104 Ind. App. 606, 10 N.E.2d 297 (1937).

131. *Gerner v. Marshall*, 193 N.E.2d 382 (Ind. App. Ct. 1963); *Kennedy v. Woods*, 131 Neb. 217, 267 N.W. 390 (1936).

132. *Lyle v. Dipuma*, 107 Ga. App. 880, 131 S.E.2d 784 (1963).

133. *Southern Pac. R.R. v. San Francisco Co. Sav. Union*, 146 Cal. 290, 79 Pac. 961 (1905).

134. *Raymore v. Kansas City Pub. Serv. Co.*, 141 S.W.2d 103 (Mo. Ct. App. 1940).

135. *Cook v. Latimer*, 274 Ala. 283, 147 So. 2d 831 (1962); *Colquett v. Williams*, 264 Ala. 214, 86 So. 2d 381 (1956).

136. *Big Ledge Copper Co. v. Dedrick*, 21 Ariz. 129, 185 Pac. 825 (1919); *Henry v. Huff*, 143 Pa. 548, 22 Atl. 1046 (1891); see also Part III-B, *infra*.

137. *Koppang v. Sevier*, 106 Mont. 79, 75 P.2d 790 (1938).

138. *Parnham v. Carl W. Linder Co.*, 36 Ill. App. 2d 224, 183 N.E.2d 744 (1962).

have a duty to argue with the judge; in *Young v. Missouri Pub. Serv. Co.*,¹³⁹ for instance, objection was made to jury argument several times and each time the trial judge said they have the instructions, to which the objector said nothing. The Supreme Court of Missouri thought this silence was acquiescence in the trial judge's determination that the instructions cured the prejudice. If the trial judge promises instructions and does not give them, no error is preserved unless the objector complains of the failure to give the instructions.¹⁴⁰ These more-than-objection cases are a random sample which indicates, more than anything else, that when the no-objection escape valve sticks, it sticks open, not closed. At their worst they force a lawyer to raise so much protest in the trial court that he annoys the trial judge and risks an invited prejudice contention as to his own conduct.¹⁴¹

It probably should be enough to record objection to prejudicial conduct, but some courts apparently also require a timely motion for mistrial.¹⁴² This requirement appears most rigid where the prejudice is slight enough that the appellate court thinks a therapeutic instruction would have cured it.¹⁴³ These cases implicitly admit that a party injured by prejudice will rarely ask for a therapeutic instruction. It is interesting to note that the Texas court has recently overruled an early principle that required both objection and motion for mistrial.¹⁴⁴

C. *The Therapeutic Instruction*

The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction.¹⁴⁵

The editors of *Case and Comment* produced in 1962 a more telling comment on the therapeutic instruction, but because it was a cartoon, it is not easily quoted in the pages of a learned journal. In the cartoon,

139. 374 S.W.2d 59 (Mo. 1964).

140. *Lyle v. Dipuma*, 107 Ga. App. 880, 131 S.E.2d 784 (1963); editorial comment, 13 DEFENSE L.J. 291 (1964).

141. *Crandall v. St. Mary's Hosp. of Troy*, 13 App. Div. 2d 595, 212 N.Y.S.2d 189 (1961).

142. *Wills v. J. J. Newberry Co.*, 43 Cal. App. 2d 595, 111 P.2d 346 (Dist. Ct. App. 1941); *Wade v. Texas Employers' Ins. Ass'n*, 150 Tex. 557, 244 S.W.2d 197 (1951); *Texas Gen. Indem. Co. v. Bridwell*, 304 S.W.2d 131 (Tex. Civ. App. 1957).

143. *Louisville & N.R.R. v. Gothard*, 273 Ala. 424, 142 So. 2d 712 (1962); *Sanitary Mkt. v. Hall*, 223 Ala. 525, 137 So. 435 (1931); *Burns v. Atchison T. & S.F.R.R.*, 372 P.2d 36 (Okla. 1962); *Texas & N.O.R.R. v. Sturgeon*, 142 Tex. 222, 177 S.W.2d 264 (1944).

144. *Condra Funeral Home v. Rollin*, 158 Tex. 478, 314 S.W.2d 277 (1958), overruling *Ford v. Carpenter*, 147 Tex. 447, 216 S.W.2d 558 (1949); see also *Pittman v. Baladez*, 158 Tex. 372, 312 S.W.2d 210 (1958); *Southern Pac. Co. v. Hubbard*, 156 Tex. 525, 297 S.W.2d 120 (1957); *Houseman v. DeCuir*, 155 Tex. 127, 283 S.W.2d 732 (1955); and *Texas Employers' Ins. Ass'n v. Haywood*, 153 Tex. 242, 266 S.W.2d 856 (1954).

145. *Krulewitch v. United States*, 336 U.S. 440, 453 (1949) (Jackson, J.).

an examining lawyer and his friendly witness wear smug, contented smiles; the opposing lawyer is on his feet and angry; each member of the jury sits with his mouth open, his hair on end and his eyes filled with horror. The judge, his eyes complacently closed, is saying to no one in particular: "Objection sustained—the jury will disregard the last remark."¹⁴⁶ Aside from whether judicial instructions to disregard aggravate prejudice, they clearly do not cure it—as is known by everyone from a cartoonist to an empirical researcher¹⁴⁷ to an associate justice of the United States Supreme Court.

It is unlikely that appellate judges have any faith in the therapeutic instruction; they adhere to the ritual of cure, but they know in their hearts that cure is unlikely in most cases and virtually impossible with the usual pallid rhetoric of judicial instruction. It is a bit of magic, an incantation, as the Texas court recently described it, at which "any evil genii then at large would scurry away to dissolve into nothingness. . . ."¹⁴⁸ But practical necessity, which is the magic lamp that houses these genii, is more potent than logic or psychology; and it is necessity which explains the fact that therapy by instruction retains its vitality in the opinions¹⁴⁹ and even in statutes.¹⁵⁰ Particularly in cases where the appellate judges regard as boilerplate the contention that the jury was prejudiced, the escape valve is always open.¹⁵¹ Most of the opinions do not inquire into the verbal content of the instruction; they are even less interested in the inflection or forcefulness with which the jury hears it. Like a labial prayer, the incantation need only be spoken; no one need demonstrate that it was heard, nor that

146. Case & Com., Jan.-Feb., 1962, p. 56.

147. Kalven and Broeder, *op. cit. supra* note 6.

148. *Travelers Ins. Co. v. Broadnax*, 365 S.W.2d 683, 685 (Tex. Civ. App. 1963), casting a rare spark of judicial sarcasm at the controlling Texas precedents on the question, *Texas & N.O.R.R. v. Sturgeon*, 142 Tex. 222, 177 S.W.2d 264 (1944), and *Wade v. Texas Employers' Ins. Ass'n*, 150 Tex. 557, 244 S.W.2d 197 (1951).

149. *Lurman v. Dikoff*, 21 Cal. Rptr. 402 (Dist. Ct. App. 1962); *Florida E. Coast Ry. v. Schweida*, 151 So. 2d 665 (Fla. Dist. Ct. App. 1963); *Kramer v. Northwestern Elevator Co.*, 91 Minn. 346, 98 N.W. 96 (1904); *Rose v. St. Louis-S.F.R.R.*, 315 Mo. 1181, 289 S.W. 913 (1926); *Klinker v. Third Ave. R.R.*, 26 App. Div. 322, 49 N.Y. Supp. 793 (1898); *Southland Greyhound Lines, Inc. v. Matthews*, 74 S.W.2d 713 (Tex. Civ. App. 1934). See also *Skeeters v. Skeeters*, 389 P.2d 313 (Ore. 1964); Annot., 94 A.L.R.2d 826 (1964).

150. GA. CODE ANN. § 81-1009 (1956), requires that the trial judge, by "all needful and proper instructions to the jury endeavor to remove the improper impression from their minds. . . ." See generally, cases arising where one of two or more federal criminal defendants enters a plea of guilty or *nolo contendere* in the presence of the jury, and there is an issue of prejudice as to remaining co-defendants: *Delli Paoli v. United States*, 352 U.S. 232 (1957); *Krulewitch v. United States*, 336 U.S. 440 (1949); *Hines v. United States*, 131 F.2d 971 (10th Cir. 1942); *United States v. Falcone*, 109 F.2d 579 (2d Cir.), *aff'd*, 311 U.S. 205 (1940); *United States v. Rollnick*, 91 F.2d 911 (2d Cir. 1937).

151. *Lurman v. Dikoff*, 21 Cal. Rptr. 402 (Dist. Ct. App. 1962); *Ford Motor Co. v. Arguello*, 382 P.2d 886 (Wyo. 1963).

it was understood, nor that it was followed.¹⁵² This is not to say that the appellate opinions make no attempt to demonstrate that therapy by instruction is rational. They do. In the first place, whether it works or not, the therapeutic instruction is apparently harmless, though on closer examination, it can aggravate prejudice. In the second place, appellate judges frequently protest their patriotic and humanitarian belief that jurors, being good citizens, do what they are told.¹⁵³ And finally, there are at least two ancillary rationalizations for the therapeutic instruction.

One of these rationalizations is a hybrid between the therapy escape valve and the no-objection escape valve (with apologies for mixing the metaphor of manufacture with the metaphor of genetics); it is a sort of "friends again" theory, imposed when the record shows that, after the court's cure was applied to the prejudice, the objector appeared to have been mollified. In *Guttman v. Civet*,¹⁵⁴ the trial judge became so incensed at one of the lawyers that, according to the appellant's brief, he "erred in throwing a file at the plaintiff's counsel in full view of the jury." When his ammunition ran out, the judge apologized ("I didn't mean to throw it at you."). The erstwhile target said "it's a slip, that's all, judge." Any prejudice arising from the trial judge's pointed demonstration, the appellate court said, was cured by all of this graciousness. The same sort of reasoning is not uncommon in lesser instances of judicial pique.¹⁵⁵ Apology and friendliness are of the essence.¹⁵⁶ Many of the cases adopting the friends again principle place weight on the fact that the offender withdrew his harmful thrust, as in *Blount Bros. Constr. Co. v. Rose*,¹⁵⁷ where the plaintiff's lawyer told

152. See, however, *Greear v. Noland Co.*, 197 Va. 233, 89 S.E.2d 49 (1955), which turns on the inadequacy of the trial judge's therapeutic instruction.

153. *Walker v. Texas Employers' Ins. Ass'n*, 155 Tex. 617, 291 S.W.2d 298 (1956); *Price v. King*, 122 N.W.2d 318 (Iowa 1963); see Kalven and Broeder, *op. cit. supra* note 6, for empirical data. *Amandes, From Voir Dire to Verdict Through a Juror's Eyes*, 9 PRAC. LAW. 21 (No. 6, 1963), is empirical evidence for the validity of the assumption, but only if one is willing to generalize Professor Amandes' interesting personal experiences.

154. 161 Cal. App. 2d 816, 821, 822, 327 P.2d 232, 235 (Dist. Ct. App. 1958); see Annot., 94 A.L.R.2d 826, 861 (1964).

155. *Balance v. Dunnington*, 241 Mich. 383, 217 N.W. 329 (1928); *McCue v. Detroit United Ry.*, 210 Mich. 554, 178 N.W. 68 (1920); *Travelers Ins. Co. v. Simon*, 126 S.W.2d 674 (Tex. Civ. App. 1939); Annot., 94 A.L.R.2d 826, 861-64 (1964).

156. *Stephenson v. City of Raleigh*, 178 N.C. 168, 100 S.E. 312 (1919). *Contra*, *Kane v. American Tankers Corp.*, 219 F.2d 637 (2d Cir. 1955); *Darrow v. Pierce*, 91 Mich. 63, 51 N.W. 813 (1892).

157. 274 Ala. 429, 149 So. 2d 821 (1962); see also *Daniel Constr. Co. v. Pierce*, 270 Ala. 522, 120 So. 2d 381 (1959); *Vachon v. Ives*, 150 Conn. 452, 190 A.2d 601 (1963); *cf. Gulf, Colo. & S.F. Ry. v. Hampton*, 358 S.W.2d 690 (Tex. Civ. App. 1962); and *King Constr. Co. v. Flores*, 359 S.W.2d 919 (Tex. Civ. App. 1962), but note that both of these cases also turn on an absence of objection; see generally 1 JONES, EVIDENCE § 358 (Gard. ed. 1958). *Contra*, *Atlantic Coast Line R.R. v. Smith*, 107 Ga. App. 384, 130 S.E.2d 355 (1963); *Central*

the jury that a \$25,000 verdict would not be a "slap on the leg" to the wealthy defendant, then withdrew the comment.

Another theory, the greatest supporter of which is probably the late Dean Wigmore, reasons that an instruction is effective, or at least as effective as an instruction can be, when it explains to the jury the reason for the law of evidence excluding the prejudicial fact or assertion from their consideration.¹⁵⁸ This theory is most appealing in the example Dean Wigmore gave—an unqualified expert witness—and in cases where the prejudicial assertion is a mistake of law.¹⁵⁹ It is less convincing when there is involved a relevant fact which the law excludes on grounds of policy; there is reason to doubt the faith in the goddess of reason demonstrated by the Iowa court last year, when it said:

Rather than pretence by silence that there is no such thing as insurance it would be far better practice to routinely tell a jury by proper instruction that whether or not any party has any kind of insurance has nothing whatsoever to do with the issues to be decided by the jury. Such is the law and in the administration of justice the truth is more effective than mystery.¹⁶⁰

Although some courts encourage trial judges to admonish erring lawyers in the jury's presence, under the theory that this will be more impressive to them than a routine direction to disregard,¹⁶¹ others apparently think mystery still has its place in jury trials.¹⁶² And, mystery aside, there is an occasional appellate opinion which admits that not even full explanation can cure prejudice,¹⁶³ especially where the prejudice is obviously of the caliber which jurors heed despite admonition.¹⁶⁴

Container Corp. v. Westbrook, 105 Ga. App. 855, 126 S.E.2d 264 (1962); *Darrow v. Pierce*, 91 Mich. 63, 51 N.W. 813 (1892); *Burke v. Cremeens*, 114 Ohio App. 313, 182 N.E.2d 324 (1961).

158. 1 WIGMORE, EVIDENCE § 8a (3d ed. 1940).

159. *Ibid.*; see *Quarant v. Parkinson*, 44 Ill. App. 2d 303, 194 N.E.2d 804 (1963); *Wagon v. Porchia*, 235 Ark. 731, 361 S.W.2d 749 (1962), and the discussion of liability insurance in Part I-A, *supra*. But see *Ryan v. Monson*, 33 Ill. App. 2d 406, 179 N.E.2d 449 (1961).

160. *Price v. King*, 122 N.W.2d 318, 323 (Iowa 1963). The Iowa court is not without judicial support. See *Throckmorton v. St. Louis-S.F. Ry.*, 179 F.2d 165 (8th Cir.), *cert. denied*, 339 U.S. 944 (1950); *Neill v. McGinn*, 175 Neb. 369, 122 N.W.2d 65 (1963).

161. *Moran v. Moran*, 52 R.I. 291, 160 Atl. 619 (1932); *Sullivan v. Collins*, 107 Wis. 291, 83 N.W. 310 (1900).

162. *Quarant v. Parkinson*, 44 Ill. App. 2d 303, 194 N.E.2d 804 (1963); *Quigley v. Metropolitan St. Ry.*, 78 N.Y. Supp. 1133 (N.Y. City Ct. 1902); *Empire Oil & Ref. Co. v. Fields*, 188 Okla. 666, 112 P.2d 395 (1940), *appeal dismissed*, 314 U.S. 572 (1941).

163. *Peterson v. Eighmie*, 175 App. Div. 113, 161 N.Y. Supp. 1065 (1916); *Frank v. Subin*, 126 N.Y. Supp. 81 (1910); see generally authorities cited, *Annot.*, 94 A.L.R.2d 826, 864, n.22 (1964).

164. *Kaufman-Straus Co. v. Short*, 311 Ky. 78, 223 S.W.2d 367 (1949); *Lilly v. Metropolitan Life Ins. Co.*, 318 Pa. 248, 177 Atl. 779 (1935); *Halepeska v. Callihan Interests, Inc.*, 371 S.W.2d 368 (Tex. 1963).

Because the escape valve of therapy by instruction is based on a non-fact, a fiction, it differs from the escape valves of no-objection and invited prejudice, which are based on rules of policy in the administration of justice (or at least on rules of procedure). Of the three, only the therapy escape valve is make-believe. It may be the peculiar pretense about it which explains why it has been attacked in the courts more consistently than any of the other escape valves, and the fact that there are a certain number of cases where it could have been applied and was rejected. There are courses of conduct, in other words, which justify a new trial, and no amount of attempted therapy will work to correct their harm.¹⁶⁵ Only occasionally do judges appear to reject in their opinions the whole idea of therapy by instruction,¹⁶⁶ or to express a lack of faith in it without rejecting it;¹⁶⁷ they more often weigh the record and determine either that the verdict bears the mark of prejudice, despite therapy, or that therapy could not have worked in the circumstances because the prejudice was the kind that is not cured by instruction.

The initial question ought to be whether the therapy appears to have worked, expressing an awareness of the fact that it might not have worked.¹⁶⁸ The second question should be the development of some sort of judicial device for measuring the effect of the therapy, aside from the fairly common assertion that the judges believe the instruction to have been ineffective.¹⁶⁹ One school of thought places an appellate burden of proof on the appellee when a seriously prejudicial incident is in the record. The Illinois court once said that it would affirm when it found prejudice plus therapy only if it could not avoid affirming on the evidence.¹⁷⁰ A less involved formula was developed in New York: "When illegal evidence properly excepted to has been received during a trial, it must be shown that the verdict was not

165. See *Bale v. Chicago Junction Ry.*, 259 Ill. 476, 102 N.E. 808 (1913).

166. See *Furst v. Second Ave. R.R.*, 72 N.Y. 542 (1878), which held that an agreement to withdraw prejudicial evidence did not remove it from the jurors' consideration.

167. *Lacy v. Uganda Inv. Corp.*, 195 N.E.2d 586 (Ohio Ct. App. 1964).

168. *Bishop v. Citizens' Trust & Sav. Bank*, 321 Ill. 518, 152 N.E. 580 (1926); *Miller v. Chicago Transit Authority*, 3 Ill. App. 2d 223, 121 N.E.2d 348 (1954); *Lilly v. Metropolitan Life Ins. Co.*, 318 Pa. 248, 177 Atl. 779 (1935).

169. *Ibid.*; *Ryan v. Monson*, 33 Ill. App. 2d 406, 179 N.E.2d 449 (1961); *Eizerman v. Behn*, 9 Ill. App. 2d 263, 132 N.E.2d 788 (1956); *Taylor v. Adams*, 58 Mich. 187, 24 N.W. 864 (1885); *Lengle v. North Lebanon Township*, 274 Pa. 51, 117 Atl. 403 (1922); *cf. Snyder v. Lehigh Valley R.R.*, 245 F.2d 112 (3d Cir. 1957); *Vergano v. New York*, 128 N.Y.S.2d 705 (Sup. Ct. 1953).

170. *Howe Mach. Co. v. Rosine*, 87 Ill. 105 (1877); see *McKee v. Yellow Cab Co.*, 36 Ill. App. 2d 415, 184 N.E.2d 743 (1962), and *Sims v. Chicago Transit Authority*, 7 Ill. App. 2d 21, 129 N.E.2d 23 (1955).

affected by it or the judgment will be reversed."¹⁷¹ This latter formula appears to be the modern one.¹⁷² However it is put, the formula is a patent indication that the court is minded to reverse because of the prejudice and despite therapeutic instruction. Proving in an appellate court that misconduct did not influence the jury is so near the impossible that the "burden of proof" formula usually can be taken to be a conclusion for reversal.

A second device for determining whether the trial judge's therapy was effective is the weighing of evidence. A typical guidepost is the amount of the verdict in an appeal where liability has been decided for the plaintiff, or the amount of liability evidence where judgment has gone for the defendant.¹⁷³ The great virtue in weighing the evidence, however onerous that responsibility is to a common law judge, is that it effectively avoids a duty "to determine, what no human tribunal can ever satisfactorily determine, that is, what influence and impression the mind of another might have received. . . ."¹⁷⁴

A third approach does not consider the effectiveness of the trial judge's therapy itself but simply makes the determination whether or not the prejudice was so potent that it must have influenced the jury (whether it in fact did or not). The question, as put by a federal court of appeals was: "Could its undeniably harmful effect be obliterated by the court's admonition to the jury, or was it such that, in the contemplation of the law, the trial could no longer be proceeded with with fairness and impartiality. . . ?"¹⁷⁵ The decision to affirm under the above approach is made easily where the appeal is from a trial judge's order granting a new trial,¹⁷⁶ but it also has come readily in cases where reversal was necessary.¹⁷⁷ There is in these cases usually

171. *Erben v. Lorillard*, 19 N.Y. 299, 302 (1859).

172. *Swanson v. Evans Oil, Inc.*, 12 App. Div. 2d 875, 209 N.Y.S.2d 860 (1961); *Lilly v. Metropolitan Life Ins. Co.*, 318 Pa. 248, 177 Atl. 779 (1935); see also *Richards v. Noyes*, 44 Wis. 609 (1878).

173. *Lafayette, Bloomington & Miss. R.R. v. Winslow*, 66 Ill. 219, 223 (1872) ("We are compelled to believe, from the amount of this verdict, that this testimony had a great influence on the minds of the jury. . . ."); *Lycoming Fire Ins. Co. v. Rubin*, 79 Ill. 402, 408 (1875) ("That this proof had great effect upon this jury is evident from the amount of the verdict. . . ."); see *Klotz v. Sears, Roebuck & Co.*, 267 F.2d 53 (7th Cir.), *cert. denied*, 361 U.S. 877 (1959); *Sheets v. Garringer*, 194 N.E.2d 757 (Ind. App. Ct. 1963); *Richards v. Noyes*, *supra* note 172.

174. *State Bank v. Dutton*, 11 Wis. 389, 392 (1860); see *Waldron v. Waldron*, 156 U.S. 361 (1895).

175. *Beck v. Wings Field, Inc.*, 122 F.2d 114, 116 (3d Cir. 1941).

176. *King v. Chicago, M. & St. P. Ry.*, 138 Iowa 625, 116 N.W. 719 (1908); see Part III-B, *infra*.

177. *Rosa v. City of Chester*, 278 F.2d 876 (3d Cir. 1960); *C. M. Spring Drug Co. v. United States*, 12 F.2d 852 (8th Cir. 1926); *McJunkin v. Kiner*, 157 Pa. Super. 578, 43 A.2d 608 (1945); *G.C. & S.F. Ry. v. Levy*, 59 Tex. 542 (1883); see *Colquett v. Williams*, 264 Ala.

no distinction as to categories of prejudice, although some of the early cases adopted the position that prejudice from the mention of certain forbidden facts was bound to be prejudicial and incurable.¹⁷⁸ A few cases, however, contain an implied distinction between the introduction of an irrelevant and prejudicial fact, and the emotional prejudice contained in an improper argument. A strong argument to that effect was made in a 1955 dissenting opinion in the New York Supreme Court;¹⁷⁹ the Illinois court once implied the same reasoning where the record showed continued implications by the plaintiff's lawyer that the defendant was a bank robber,¹⁸⁰ and, in another case, recently came to the same conclusion when faced with prejudicial facts introduced into a capital murder trial.¹⁸¹ The distinction was impliedly recognized in the Supreme Court of the United States as early as 1894, when the court talked about the peculiarly potent prejudice that comes from "the illegal use of evidence."¹⁸²

A number of cases which turn on the inadequacy of therapy are to be distinguished from those in which judges at the appellate level find no fault in the therapy but believe that any therapy would have been useless. In a Mississippi opinion of last year, the court reversed because the judge's telling the jurors that they were all reasonable men was not potent enough to cure a golden-rule jury argument;¹⁸³ the Supreme Court of the United States recently reversed a case because the extension of the therapeutic instruction did not cover all possible prejudice in improper testimony;¹⁸⁴ other recent cases fit into the same category.¹⁸⁵ Even perfunctory instructions occasionally have come under fire, contrary to the implications of the *Case and Comment* cartoon.¹⁸⁶

214, 222, 86 So. 2d 381, 388 (1956) ("neither retraction nor rebuke would have destroyed the strongly prejudicial suggestions. . . .").

178. See Part I-A, *supra*.

179. *Nappi v. Falcon Truck Renting Corp.*, 286 App. Div. 123, 141 N.Y.S.2d 424 (1955), *aff'd mem.*, 1 N.Y.2d 750, 152 N.Y.S.2d 297 (1956); Bostow, J., dissenting in the appellate division, at 432:

No matter how "intelligent, just and fair" twelve jurors may have been, no cautionary words of the court could subtract from the fact that they were plainly told that the plaintiff could proceed against the present defendant and thereby the plaintiff did not lose his rights to compensation. . . . While the court did instruct the jury that they should not take all of this into consideration, it seems to me that it would be naive to believe that they did not do so.

180. *Emich v. Citizens' Trust & Sav. Bank*, 321 Ill. 518, 152 N.E. 580 (1926).

181. *People v. Bernette*, 30 Ill. 2d 359, 197 N.E.2d 436 (1964).

182. *Waldron v. Waldron*, 156 U.S. 361 (1894), relying on dicta in *Hopt v. Utah*, 120 U.S. 430 (1887).

183. *Copiah Dairies v. Addkison*, 153 So. 2d 689 (Miss. 1963).

184. *Tipton v. Socony Mobil Oil Co.*, 375 U.S. 34 (1963).

185. *Colquett v. Williams*, 264 Ala. 214, 86 So. 2d 381 (1956); *Ridgeway v. North Star Terminal & Stevedoring Co.*, 378 P.2d 647 (Alaska 1963); *Lobalzo v. Varoli*, 409 Pa. 15, 185 A.2d 557 (1962); *contra*, *Miller v. Alvey*, 194 N.E.2d 747 (Ind. App. Ct. 1963).

186. *Surface v. Bentz*, 238 Pa. 610, 77 Atl. 922 (1910).

If any trend can be distilled from the cases in which appellate judges leave open the escape valve of judicial therapy, as compared with those in which they seem to recognize the "unmitigated fiction" of which Mr. Justice Jackson spoke, it is a trend toward realism. But realism here has two implications. In one sense it is realistic to conclude that jurors usually do not lose their prejudice just because they are told to lose it. Many of the recent opinions demonstrate that kind of realism. But it is also realism to notice that re-trials have a disastrous effect on trial court dockets already overloaded with cases yet to be tried the first time. There comes a point at which the appellate judge must ask himself: This is bad, but is it bad enough to put the court system and these litigants through the expense and time and stress of another trial?¹⁸⁷ The researcher, who need not, fortunately, answer the question, looks out from the safe harbor of a policy judgment and concludes that the appellate court is the poorest of all places for the correction of prejudice. There has to be a better way to carry out the reform.

D. *No Prejudice*

Faced with a well-made record, filled with the appropriate objections and motions for new trial, clear of the taint of invited prejudice and of the possibility that the appellate judges will avoid reversal by finding a therapeutic instruction, the appellant from prejudice faces his most imposing task: He must demonstrate to the judges that the jury was prejudiced. The judges have one escape valve left; they can find that it was not. This is a decision they can reach in one of two ways (to borrow Judge Doe's lexicon): by asking whether there was prejudice as a matter of law; or by asking if there was prejudice as a matter of fact.¹⁸⁸

There is a substantial body of authority for the generalization that decisions as to the fact of jury prejudice are to be made in the first instance by the trial judge; recent opinions from the Oregon Supreme Court are conspicuous in expressly endorsing this point of view, but they are not alone if the reader is willing, with Judge Doe, to equate question-of-fact and "trial judge discretion."¹⁸⁹ Admittedly, generous

187. *Durkin v. Lewitz*, 3 Ill. App. 2d 481, 123 N.E.2d 151 (1954); *Gall v. Gall*, 114 N.Y. 109, 21 N.E. 106 (1889). Both opinions suggest the importance of policy considerations relating to the efficient administration of justice.

188. Reid, *A Peculiar Mode of Expression (Judge Doe's Use of the Distinction Between Law and Fact)*, 1963 WASH. U.L.Q. 427, 429; see Part III-B *infra*. To the extent that the question is one of fact, deference to the trial judge's "discretion" will be more appropriate, if not more likely to come about, than if the question is one of law.

189. Reid, *supra* note 188; Part III-B, *infra*; *Skeeters v. Skeeters*, 389 P.2d 313 (Ore. 1964); *Martin v. Dretsch*, 380 P.2d 788 (Ore. 1963); see also *Boettger v. Babcock & Wilcox*

appellate deference arises most often when the prejudicial incident is mild or ambiguous—as, for instance, in a 1961 Tennessee opinion, where the appellee's lawyer had read law to the jury in his final argument;¹⁹⁰ or, in a Pennsylvania criminal obscenity case, where the prosecutor referred to the defendant's magazine as a "scandal sheet . . . only for the purpose of appealing to the lowest instincts of men. . . .";¹⁹¹ or where the voir dire question is only slightly improper;¹⁹² or where the plaintiff's lawyer took advantage of his jury argument to deliver a sentimental valedictory address to the community.¹⁹³ However some instances of appellate deference involve more serious prejudice. In *Clark v. Essex Wire Corp.*,¹⁹⁴ the plaintiff's lawyer mentioned the amount of his damages prayer, in violation of a settled Pennsylvania rule; the trial judge (the judicial novelist, Judge Curtis Bok) decided that, since the defendant's complaint of prejudice turned on liability, not on damages, the prejudice had not influenced the result. The Pennsylvania Supreme Court respected his conclusion.

The numerical majority of the opinions, though they do not allude to a distinction between law and fact, decide the question of prejudice as a question of law.¹⁹⁵ The New York court once expressed its unwillingness to reverse for prejudice because that decision would "impede the public business," and because there was in the record an opportunity to take refuge behind a therapeutic instruction.¹⁹⁶ (In this the New York judges set—or followed—a common pattern; many of the opinions find no prejudice because of a therapeutic instruction, first implicitly admitting, of course, that there was prejudice to be removed

Co., 253 F.2d 854 (3d Cir. 1958); *C. M. Spring Drug Co. v. United States*, 12 F.2d 852 (8th Cir. 1926); *Brown v. McCuan*, 56 Cal. App. 2d 35, 132 P.2d 838 (Dist. Ct. App. 1942); *Neill v. McGinn*, 175 Neb. 369, 122 N.W.2d 65 (1963); *Fields v. Creek*, 21 Wis. 2d 562, 124 N.W.2d 599 (1963) (dissenting opinion).

190. *McCandless v. Sammons*, 50 Tenn. App. 413, 362 S.W.2d 259 (1961); see *Muncie Wheel & Jobbing Co. v. Finch*, 150 Mich. 274, 113 N.W. 1107 (1907).

191. *Commonwealth v. Donaducy*, 167 Pa. Super. 611, 615, 76 A.2d 440, 442 (1950).

192. *Goldstein v. Fendelman*, 336 S.W.2d 661 (Mo. 1960).

193. *Shea v. D. & N. Motor Transp. Co.*, 316 Mass. 553, 55 N.E.2d 950 (1944); see *Murray v. Hills Cab Co.*, 198 N.E.2d 466 (Ohio Ct. App. 1963); *Martin v. Dretsch*, 234 Ore. 138, 380 P.2d 788 (1963).

194. 361 Pa. 60, 63 A.2d 35 (1949); *Bullock v. Chester & Darby Telford Rd. Co.*, 270 Pa. 295, 113 Atl. 379 (1921) establishes the Pennsylvania rule forbidding mention of the damages prayer to the jury. See also *Burnett v. Bledsoe*, 159 So. 2d 841 (Ala. 1964); *Wills v. J. J. Newberry Co.*, 43 Cal. App. 2d 595, 111 P.2d 346 (Dist. Ct. App. 1941); *Jones v. Cary*, 219 Ind. 268, 37 N.E.2d 944 (1941); *Brown v. Parker*, 375 S.W.2d 594 (Mo. Ct. App. 1964).

195. See the federal criminal cases cited in note 150, *supra*, and *Kelling v. United States*, 121 F.2d 428 (8th Cir. 1941); *Walker v. United States*, 93 F.2d 383 (8th Cir. 1937); and *Stewart v. United States*, 211 Fed. 41 (9th Cir. 1914).

196. *Gall v. Gall*, 114 N.Y. 109, 21 N.E. 106 (1889). Compare *Erben v. Lorillard*, 19 N.Y. 299 (1859), with *People v. Smith*, 104 N.Y. 491, 10 N.E. 873 (1887).

by the instruction.¹⁹⁷ With more candor, some opinions admit that the removal of prejudice is doubtful, but hold that sound policy requires that an absence of prejudice be assumed. "[W]hen the record comes to this court bearing the official sanction of the trial judge . . . Every reasonable presumption must be indulged in that the trial judge has performed his duty. . . ."¹⁹⁸

When appellate judges themselves determine the absence or presence of prejudice, or decide on policy grounds to assume there was no prejudice, they are making a determination of law; but the process is a curious one, because in arriving at the legal result, the judges usually weigh the evidence.¹⁹⁹ At times they do this either by determining from their own sense of fairness, imposed on the record, whether the verdict reflects prejudice,²⁰⁰ or by looking at the experience and mentality of the average juror in terms of the decision and the evidence. If the record demonstrates that the trial was, as the Nevada court put it last year, "a one-sided affair," appellate judges typically affirm despite the prejudice.²⁰¹ Especially where the liability decision is supported by the evidence, the usual disposition is to affirm.²⁰² A \$900 verdict for injured sensibilities because of a mouse in a soft-drink bottle, for instance, was held not to reflect prejudice from irrelevant medical evi-

197. *Pennsylvania Co. v. Roy*, 102 U.S. 451 (1880); *Alabama Great So. R.R. v. Frazier*, 93 Ala. 45, 9 So. 303 (1891); *Wills v. J. J. Newberry Co.*, 43 Cal. App. 2d 595, 111 P.2d 346 (Dist. Ct. App. 1941); *Hollingworth v. City of Fort Dodge*, 125 Iowa 627, 101 N.W. 455 (1904); *Temple v. State*, 195 N.E.2d 850 (Ind. 1964); *Oil Transp. Co. v. Pash*, 191 Kan. 229, 380 P.2d 341 (1963) (one judge dissenting); *Potts v. Krey*, 362 S.W.2d 726 (Ky. 1962); *Busch v. Fisher*, 89 Mich. 192, 50 N.W. 788 (1891); *Santee v. Haggart Constr. Co.*, 202 Minn. 361, 278 N.W. 520 (1938); *Holmes v. Moffat*, 120 N.Y. 159, 24 N.E. 275 (1890); *White v. Standard Oil Co.*, 116 Ohio App. 212, 187 N.E.2d 504 (1962); *Cummings v. Van Valin*, 363 S.W.2d 385 (Tex. Civ. App. 1962); *Kelley v. Great No. Ry.*, 59 Wash. 2d 894, 371 P.2d 528 (1962).

198. *North Chicago St. Ry. v. Cotton*, 140 Ill. 486, 503, 29 N.E. 899, 904 (1892); see *Commonwealth v. Donaducy*, 167 Pa. Super. 611, 76 A.2d 440 (1950).

199. Of course, judges also weigh evidence when the issue is whether to direct a verdict or grant a motion for judgment N.O.V. *Rust v. Reeher*, 198 N.E.2d 783 (Ohio Ct. App. 1963), is an interesting and recent example of appellate evidence weighing.

200. *C. M. Spring Drug Co. v. United States*, 12 F.2d 852 (8th Cir. 1926); *United States v. Jones*, 32 Fed. 569 (D.S.C. 1887); *Williams v. City of Anniston*, 257 Ala. 191, 58 So. 2d 115 (1952); *Paliokaitis v. Checker Taxi Co.*, 324 Ill. App. 21, 57 N.E.2d 216 (1944); *Smith v. Russ*, 22 Wis. 439 (1868); see *Tipton v. Socony Mobil Oil Co.*, 315 F.2d 660 (5th Cir.), *rev'd*, 375 U.S. 34 (1963); *Martinez v. Moore*, 34 Cal. Rptr. 606 (Dist. Ct. App. 1963); *Deerfield v. Northwood*, 10 N.H. 269 (1839); *Hamblett v. Hamblett*, 6 N.H. 333 (1833).

201. *Boyd v. Pernicano*, 385 P.2d 342, 343 (Nev. 1963); some decisions find that prejudice influenced damages, but did not influence the verdict on liability, and either grant a limited new trial or a remittitur. See Part III-C, *infra*; James, *Remedies for Excessiveness or Inadequacy of Verdicts*, 1 DUQUESNE L. REV. 143 (1963).

202. *Big Ledge Copper Co. v. Dedrick*, 21 Ariz. 129, 185 Pac. 825 (1919); *Jacobson v. National Dairy Prods. Corp.*, 32 Ill. App. 2d 37, 176 N.E.2d 551 (1961); *Stillwater Milling Co. v. Morehouse*, 381 P.2d 1006 (Okla. 1963); *Magnolia Petroleum Co. v. Sutton*, 208 Okla. 488, 257 P.2d 307 (1953).

dence.²⁰³ A comparison between the verdict and the amount of the prayer for damages would seem inapposite, in view of the casual manner in which many trial lawyers arrive at an *ad damnum* figure; still, there is some recent authority for making the comparison.²⁰⁴

These opinions evidence a reasoning process that begins with the appellate judges' opinions of the things an average juror knows and feels, and ends with the conclusion that the jury was or was not prejudiced because the tacitly hypothetical juror is a citizen who would or would not have been influenced in the circumstances.²⁰⁵ In one case, the defense lawyer performed an impromptu demonstration before the jury to prove that a lighted cigarette would not ignite gasoline. The Supreme Court of Oklahoma thought this not prejudicial because the average juror already knows that trick.²⁰⁶ The Illinois Appellate Court thought in 1961 that jurors would be more influenced than judges by irrelevant accident testimony.²⁰⁷ This jury-measuring device is often expressed in terms of the appellate judge's laudable respect for the intelligence and fairness of the average citizen. "By and large, they are intelligent, just and fair, and it is reasonable to conclude that as jurors they have not left behind them their common sense. . . ."²⁰⁸ This finds specific application in the case where an occurrence during the trial indicates the jury was or was not influenced by probative evidence more than by prejudice. In a New York Supreme Court opinion, for instance, the fact that the jurors asked for repetition of probative testimony indicated to the appellate judges that they were not influenced by prejudice;²⁰⁹ on the other hand, where the key issue was credibility of witnesses, the Illinois Appellate Court thought it likely that prejudice may have influenced the jurors' decision.²¹⁰ Some of the

203. *Harris v. Coca-Cola Bottling Co.*, 35 Ill. App. 2d 406, 183 N.E.2d 56 (1962); see *Raymore v. Kansas City Pub. Serv. Co.*, 141 S.W.2d 103 (Mo. Ct. App. 1940); *Hager v. Bushman*, 255 App. Div. 934, 8 N.Y.S.2d 725 (1938); *City of Spokane v. Costello*, 42 Wash. 182, 84 Pac. 652 (1906); *Fields v. Creek*, 21 Wis. 2d 562, 124 N.W.2d 599 (1963).

204. *American Nat'l Bank & Trust Co. v. Peoples Gas Light & Coke Co.*, 42 Ill. App. 2d 163, 191 N.E.2d 628 (1963).

205. *Big Ledge Copper Co. v. Dedrick*, 21 Ariz. 129, 185 Pac. 825 (1919); *Durkin v. Lewitz*, 3 Ill. App. 2d 481, 123 N.E.2d 151 (1954); *Busch v. Fisher*, 89 Mich. 192, 50 N.W. 788 (1891); *Murray v. Hills Cab Co.*, 198 N.E.2d 466 (Ohio Ct. App. 1963); *Stillwater Milling Co. v. Morehouse*, 381 P.2d 1006 (Okla. 1963); *Martin v. Dretsch*, 234 Ore. 138, 380 P.2d 788 (1963); *Waterman v. Chicago & Alton R.R.*, 82 Wis. 613, 52 N.W. 247 (1892).

206. *Magnolia Petroleum Co. v. Sutton*, 208 Okla. 488, 257 P.2d 307 (1953).

207. *Caley v. Manicke*, 29 Ill. App. 2d 323, 173 N.E.2d 209 (1961) (dicta).

208. *Nappi v. Falcon Truck Renting Corp.*, 286 App. Div. 123, 128, 141 N.Y.S.2d 424, 428 (1955), *aff'd mem.*, 1 N.Y.2d 750, 152 N.Y.S.2d 297 (1956); see *Caley v. Manicke*, *supra*, note 207; *Connecticut Ins. Co. v. T. C. Caummisar & Sons*, 218 Ky. 378, 291 S.W. 776 (1927).

209. *Galotti v. Deansboro Supply Co.*, 248 App. Div. 20, 289 N.Y. Supp. 535 (1936).

210. *Panelle v. Chicago Transit Authority*, 47 Ill. App. 2d 119, 197 N.E.2d 501 (1964). Compare *Berger v. United States*, 295 U.S. 78 (1935), with *United States v. O'Brien*, 319 F.2d 437 (7th Cir. 1963).

determinations are not nearly that advertent and seem to turn on an appellate determination that the prejudice did not influence the jurors because it does not appear to the judges to have been serious. *Hopt v. Utah*²¹¹ is a distinguished example; the Court thought that the prosecutor's saying that the case was the most remarkable he had ever tried was more likely to help the defendant than to harm him. In another category of cases, judges have determined that there was no prejudice without indicating how they arrived at their decision; *Nappi v. Falcon Truck Renting Corp.*²¹² illustrates this mysterious process better than most opinions because Judge Bostow, dissenting, took his brethren to task for using it. In *People v. Horton*, the trial judge, commenting on the defendant's alibi witnesses, told the jury "the alibi testimony doesn't convince the court at all. Alibi witnesses are worth \$2 a dozen anyway. Anybody can prove an alibi if you've got some friends and relatives that want to come in and swear." The Illinois Supreme Court did not think that remark, "considered in context," was prejudicial.²¹³ One of the most remarkable examples of this non-reasoning occurred this year in the Court of Appeals of Kentucky. In a suit for damages to the plaintiff's car while it was in the defendant's gasoline station, the trial court allowed an expert witness to testify to facts that implied a leaky muffler set off the explosion which caused the damage. The questions had been asked over objection and the plaintiff contended they had prejudiced him. The court of appeals held that there was no prejudice because the issue of holes in the muffler was irrelevant:

We are unable to understand how this muffler, holes or no holes, or any muffler, had anything to do with the question of liability. . . . It was immaterial from what source the gasoline fumes were ignited. Therefore, even if the questions concerning this muffler were improper, they could have had no prejudicial effect.²¹⁴

In assessing the minds and hearts of jurors, appellate judges are without objective standards. They sometimes appear to abandon the assumption that they are able to know how jurors react, and instead apply their own attitudes. This may be understandable when they are

211. 120 U.S. 430 (1887). See also *Nelson v. Union Wire Rope Corp.*, 39 Ill. App. 2d 73, 187 N.E.2d 425 (1963).

212. 141 N.Y.S.2d 424, 430-32 (Sup. Ct. 1955), *aff'd mem.*, 1 N.Y.2d 750, 152 N.Y.S.2d 297 (1956); his opinion relied upon *Zimber v. Kress*, 225 App. Div. 16, 232 N.Y. Supp. 46 (1928); *Regan v. Frontier Elevator & Mill Co.*, 211 App. Div. 164, 208 N.Y. Supp. 239 (1924); and *Posnick v. Crystal*, 181 App. Div. 660, 168 N.Y. Supp. 868 (1918).

213. *People v. Horton*, 30 Ill. 2d 293, —, 196 N.E.2d 649, 650 (1964); see *Faber v. C. Reiss Coal Co.*, 124 Wis. 554, 102 N.W. 1049 (1905).

214. *McKinley v. Danville Motors, Inc.*, 374 S.W.2d 366, 367 (Ky. 1964).

reviewing prejudice which occurred before a trial judge sitting without a jury,²¹⁵ but it is an approximate approach at best in reviewing jury cases. It is expressed most often in reference to prejudicial conduct which the judges, in their experience, find tame (the conclusion being that, because it is tame to them it could not have prejudiced the jurors). In *Scott v. Campbell*, for instance, the Ohio Court of Appeals thought the jurors not prejudiced because the conduct in the trial court was "mild and genteel in comparison with many we have heard and read."²¹⁶ The Illinois Appellate Court, in a similar holding, noted that the conduct complained of "was mild . . . compared with other digressions from the straight and narrow path in the presentation of personal injury cases."²¹⁷ Reviewing prejudiced verdicts is such a difficult business for appellate judges that writers in the ivory tower ought to show them sympathy rather than sarcasm, but these we-don't-see-it-so-how-could-they-have-seen-it cases are painfully like the blind men in H. G. Wells' story, who thought there was no sky because they could not feel it with their hands. Cases in which the court concludes that justice does not require reversal, without explaining why they have reached this conclusion, are rarer than candid attempts to explain the fact- or law-finding process; they are probably even less commendable.²¹⁸

With the development and refinement of devices which correct trial errors, short of full-dress retrial of all issues, it may be that appellate judges will appraise prejudiced verdicts more honestly and will avoid questionable processes for finding an absence of prejudice, and the other escape valves.²¹⁹ Remittitur is a traditional half-way point which, because it avoids retrial in most cases, may occasion a franker review of verdicts inflated by prejudice.²²⁰ Its disadvantage is that it places

215. *Broderick v. Torresan*, 88 Cal. App. 2d 18, 198 P.2d 75 (Dist. Ct. App. 1948). The trial judge had said that he did not intend to be influenced by the prejudicial information. See also *Swanson v. Chase*, 107 Ga. App. 295, 129 S.E.2d 873 (1963).

216. 115 Ohio App. 208, 212, 184 N.E.2d 485, 488 (1961); see *Atlantic Coast Line R.R. v. Smith*, 107 Ga. App. 384, 130 S.E.2d 355 (1963); *City of Portland v. Holmes*, 232 Ore. 505, 376 P.2d 120 (1962).

217. *Durkin v. Lewitz*, 3 Ill. App. 2d 481, 494-95, 123 N.E.2d 151, 158 (1954). See also *Eizerman v. Behn*, 9 Ill. App. 2d 263, 132 N.E.2d 788 (1956).

218. *Gall v. Gall*, 114 N.Y. 109, 21 N.E. 106 (1889); *Magnolia Petroleum Co. v. Sutton*, 208 Okla. 488, 257 P.2d 307 (1953); *City of Shawnee v. Sparks*, 26 Okla. 665, 110 Pac. 884 (1910).

219. The discipline of the Bar is a largely untried alternative. See Part III-D, *infra*; *Durkin v. Lewitz*, 3 Ill. App. 2d 481, 495, 123 N.E.2d 151, 158 (1954) ("[I]n this day when courts are overwhelmed with this type of practice and three or four years is required to bring a personal injury case to trial, it behooves those who practice in that branch of the profession to direct their attention with rigid self-discipline to the fair presentation of their case. . . .").

220. *Coca Cola Bottling Co. v. Carter*, 202 Ark. 1026, 154 S.W.2d 824 (1941); *Brabeck v. Chicago & N.W. Ry.*, 117 N.W.2d 921 (Minn. 1962), noted at 12 DEFENSE L.J. 228 (1963);

on appellate judges the burden of deciding, as the Wisconsin court put it, "the lowest amounts which an unprejudiced jury acting reasonably would probably award."²²¹ Further, there is the problem of deciding whether prejudice infects both a verdict on liability and a verdict on damages and at what point the infection can be excised without disturbing the finding on liability.²²² This difficulty may be cured as divided trials *ab initio* become more common.²²³

III. SOLUTIONS

The only completely effective solution for the problem of prejudiced jurors is a disciplined Bar which is as diligent to provide fair trials as the judiciary is. If that kind of Bar existed, appellate and trial judges could order retrials of all cases in which jurors might have been prejudiced by an accidental occurrence; the retrial load would undoubtedly be lighter than it is now. Discipline is largely an untested solution. It has not been used frequently by trial or appellate judges to limit and eliminate prejudiced verdicts. To some extent, pretrial devices have been used. To a greater extent, appellate judges have encouraged the use of vigorous efforts to avoid and mitigate prejudice during trial. Finally, appellate courts, especially in recent years, have attempted to make wider use of limited reversals for new trial. These three categories of remedy are discussed in this Part, along with a final section analyzing past and present attempts to achieve fairer trials through sanctions visited directly on offending lawyers.

A. Solutions Before Trial

Modern trial procedure has at its command all of the weapons for efficient, flexible administration of justice that a century of reform could give it. It ought to be able to accomplish now what courts have always pretended therapeutic instructions do. The only sure way to

State v. Jansen, 207 Minn. 250, 290 N.W. 557 (1940); Fowler Butane Gas Co. v. Varner, 244 Miss. 130, 141 So. 2d 226 (1962). The subject is discussed generally at 12 DEFENSE L.J. 521 (1963); see also James, *supra*, note 201.

221. Sandeen v. Willow River Power Co., 214 Wis. 166, 186, 252 N.W. 706, 714 (1934).

222. Ryan v. Roberts, 2 App. Div. 2d 936, 156 N.Y.S.2d 366 (1956); Graham v. Morris, 366 S.W.2d 792 (Tex. Civ. App. 1963); Waterman v. Chicago & Alton R.R., 82 Wis. 613, 52 N.W. 247 (1892). The same issue faces the judge granting a new trial limited to the issue of damages.

223. The standards are always applied more realistically in capital criminal cases. See State v. Strong, 119 Ohio App. 31, 196 N.E.2d 801 (1963). To some extent this is true of trials for lesser crimes; see, e.g., Kotteakos v. United States, 328 U.S. 750 (1946). Where trial judge misconduct is the source of prejudice, appellate judges may be more stringent than they are where the prejudice comes from lawyers—perhaps because they think deference is less appropriate. See Annot., 94 A.L.R.2d 826 (1964).

eliminate prejudice is to see to it that prejudicial information never reaches the eyes and ears of the jury. The time to eliminate prejudice, if lawyers will not exercise the professional self-control that professional ethics enjoin upon them, is before trial. There are three pretrial devices which can be marshalled to this end: (1) the motion to strike allegations in pleadings, which will carry with it, if sustained, the court's determination that evidence to prove the stricken allegations is inadmissible; (2) the pretrial order, following an effective pretrial conference in which each side discloses the facts surrounding possible prejudicial testimony; (3) the ill-defined pretrial motion to suppress evidence.

A sustained motion to strike allegations in a pleading is neither as efficient nor as broad as a pretrial order, but it at least advises lawyers that some of the testimony they planned to use is irrelevant. In *Ridgeway v. North Star Terminal & Stevedoring Co.*,²²⁴ the Alaska Supreme Court considered an oral pretrial ruling that the defendant could not prove that the plaintiff's employer carried workmen's compensation insurance. The defendant asked questions on this point anyway, and made other mention of workmen's compensation. The appellate judges thought the conduct so serious that a new trial was required, despite forceful and detailed therapeutic instructions. (Query: How would they have ruled had no pretrial ruling been made?)

The court's opinion is largely a written lecture to the trial judge. The court said, among other things, that its pretrial rule²²⁵ provided a better means for dealing with prejudicial evidence questions than an oral motion on a pleading. "A written pretrial order would have settled the matter."²²⁶ In an even more significant part of the lecture, the court suggested that violation of the pretrial order would have justified strong reprisal: "Deliberate breach of the rule by counsel would be grounds for disciplinary action by the court and imposition of costs in the event of mistrial."²²⁷ This is significant when one considers that the usual appellate treatment of misconduct by lawyers is the punishment of clients.

The language of modern court rules on pretrial conferences permits the question of prejudicial evidence to be part of the agenda, if the facts involved are not seriously controverted, and if the lawyers will disclose them. The Indiana rule, for example, permits pretrial con-

224. 378 P.2d 647 (Alaska 1963).

225. ALASKA R. CIV. P. 16, which is substantially the same as FED. R. CIV. P. 16 as to matters which can be taken up at a pretrial conference and settled in a pretrial order.

226. 378 P.2d 647, 650 (Alaska 1963).

227. *Ibid.*

sideration of questions concerning the elimination of unnecessary evidence, as well as consideration of "such other matters as may expedite the determination of the action."²²⁸ The federal rule permits consideration of anything that "may aid in the disposition of the action" and contemplates a rule which "when entered controls the subsequent course of the action. . . ."²²⁹

The effectiveness of a pretrial conference and order varies directly with the amount of disclosure lawyers are willing to make during the conference. Given disclosure, one of the results of the conference "is to take cases from the realm of surprise and maneuvering whereby an unwary counsel might see the just cause of his client lost."²³⁰ On the other hand, a pretrial conference of more routine dimensions, in which eminent prejudice is known to both sides and discussed by neither, is an exercise in futility. In *Beck v. Wings Field, Inc.*,²³¹ the plaintiff planned to offer an expert witness on landing fields who was prepared to say that his airplane had crashed in the same place the plaintiff's airplane crashed. Both sides obviously knew this witness was prepared to say this. (The defendant's lawyer tried during trial to keep the question from being asked, and failed.) The testimony got into the record, and the trial judge gave an emphatic therapeutic instruction to the jury, which, the appellate judges held, was insufficient to cure the harm. The appellate opinion notes that a pretrial conference was held; if the crucial expert testimony had been discussed at that conference, an expensive appeal and second trial might have been avoided. In *Carlock v. Southeastern Greyhound Lines*,²³² the plaintiffs' lawyers anticipated questions at trial, from the defense, which would suggest personal and immoral relations between the plaintiffs. During a pretrial conference, they asked the court to rule on the admissibility of the testimony and, if it were admissible, for permission to call rebuttal witnesses on the point. The defense lawyers contended it was not a proper place to decide the question; the trial judge ruled against the expected evidence and in favor of discussing prejudicial evidence before trial.

The motion before trial to suppress prejudicial testimony is apparently a distant cousin of the criminal rule permitting pretrial sup-

228. IND. SUP. CT. R. 1-4(e).

229. FED. R. CIV. P. 16(6).

230. *Cherney v. Holmes*, 185 F.2d 718, 721 (7th Cir. 1950). Pretrial disclosure can be helpful, too, in the preparation of cases for trial; see HICKAM & SCANLON, PREPARATION FOR TRIAL 209-10 (1963).

231. 122 F.2d 114 (3d Cir. 1941).

232. 8 FED. RULES SERV. 16.261, Case 1 (E.D. Tenn. May 8, 1944).

pression of illegally seized evidence.²³³ Many appellate courts will not permit it in civil cases;²³⁴ a few have endorsed it,²³⁵ and a few others leave the propriety of the motion to the trial judge.²³⁶ The device in form is similar to the motion to strike allegations in pleadings but in operation is similar to a pretrial evidence order; those courts which have endorsed or permitted it have also suggested that the order, whatever its form, confines the trial as much as a pretrial order would.²³⁷ This emphasis may require lawyers to adhere to specific pretrial rulings more diligently than they have adhered to the rules of evidence and the ethics of advocacy.

Any one of these three pretrial devices is obviously superior to waiting (as the 19th Century judges supposed a lawyer should) until a prejudicial issue explodes in the presence of a jury. But, even when the issue appears at that crucial moment, it may be possible to obtain a ruling, out of the jury's presence, barring prejudicial information.²³⁸ This was tried unsuccessfully by the defense lawyer in the *Beck* case. Still, many courts seem more accustomed to the device than they are to the motion before trial to suppress evidence.²³⁹ The new Code of Trial Conduct of the American College of Trial Lawyers endorses it,²⁴⁰ and the federal district court in New York once suggested that it is preferable to a pretrial motion to strike pleadings. That case, *Minneapolis Gasoline & Fuel Co. v. Ethyl Gasoline Corp.*, involved a civil antitrust complaint which would have informed the jury of criminal action against the same defendants. The defense moved to strike the allegations and was overruled: "[T]he defendants may take appropriate steps before the trial judge to prevent the plaintiff's reading these allegations to a jury. . . ."²⁴¹

B. Solutions During Trial

There is a long-standing tradition in the review of trial judges that deference be made to their superior ability to observe and deal with occurrences during the trial. Dean Wigmore devoted much of his enormous energy urging that the deference be given greater play than

233. FED. R. CRIM. P. 41(e).

234. Annot., 94 A.L.R.2d 1087, 1092-95 (1964).

235. *Id.* at 1095-96; *State v. Baker Bros. Nursery*, 366 S.W.2d 212 (Tex. 1963).

236. Annot., *supra* note 234, at 1097-98.

237. *Ibid.*; *Burnett v. Hernandez*, 263 F.2d 212 (9th Cir. 1959).

238. *Martin v. Miles*, 41 Ill. App. 2d 208, 190 N.E.2d 473 (1963); *Garbell v. Fields*, 36 Ill. App. 2d 399, 184 N.E.2d 750 (1962).

239. See Annot., *supra* note 234.

240. American College of Trial Lawyers, *Code of Trial Conduct* (1963), reprinted at 32 J. BAR. ASS'N KAN. 117 (1963-64).

241. 2 F.R.D. 307 (S.D.N.Y. 1941).

it had in his day, and modern judges appear to agree with him.²⁴² In one sense this deference to trial judges is, as Mr. Justice Jackson said, "unmitigated fiction," which is illustrated best by the number of opinions which dispose of prejudice contentions by noting that the judge gave a routine instruction to disregard them. In another sense—and this must be the sense in which Dean Wigmore wrote on the subject—the principle is nothing more than a recognition of the fact that a cold record is an imperfect way to understand what occurred before the jury.

When prejudice is charged, a trial judge has a duty to rule correctly (to find facts accurately) on objections to prejudicial conduct, motions to strike it, motions for instructions on it, and motions for mistrial because of it. This is the area appellate judges identify, normally, when they talk about trial judge discretion. But, prior to the fact-finding duty, the trial judge has a duty to act on his own motion to keep the trial fair, and a duty to act effectively to reduce prejudice, when he responds to a motion. The two functions are analytically distinct.

1. *The Duty to Act Effectively*

"It is always the duty of a trial court to control proceedings to insure . . . a fair and impartial trial,"²⁴³ the Illinois court said this year, reversing a trial judge who did not intervene on his own motion to prevent the introduction of prejudicial evidence. There seems to be a consensus among judges, at both the trial²⁴⁴ and appellate²⁴⁵ levels, that reversal is justified if conduct occurs which would justify a mistrial, were the motion for mistrial made, and the trial judge fails to intervene on his own motion. "[L]ike other difficult and delicate duties, it must be performed by those upon whom the law imposes it"; interference by the trial judge "is due to truth and justice."²⁴⁶ This is no more than one aspect of a trial judge's broader duty to exercise

242. Judge Spencer A. Gard, the author of the current edition of JONES, EVIDENCE, has expressed that opinion, and it was also found to be the opinion of most of the trial judges of Indiana. See Shaffer, *Bullets, Bad Florins, and Old Boots: A Report of the Indiana Trial Judges Seminar on the Judge's Control Over Demonstrative Evidence*, 39 NOTRE DAME LAW. 20, 33 (1963).

243. *People v. Bernette*, 30 Ill. 2d 359, —, 197 N.E.2d 436, 444 (1964), a criminal case; see also *Cross v. State*, 68 Ala. 476 (1881).

244. Shaffer, *supra* note 242, at 33.

245. *Altenbaumer v. Lion Oil Co.*, 186 F.2d 35 (5th Cir. 1950), *cert. denied*, 341 U.S. 914 (1951); *C. M. Spring Drug Co. v. United States*, 12 F.2d 852 (8th Cir. 1926); *Ethridge v. Goyer Co.*, 241 Miss. 333, 131 So. 2d 188 (1961); *Swanson v. Evans Oil, Inc.*, 12 App. Div. 2d 875, 209 N.Y.S.2d 860 (1961); *Nappi v. Falcon Truck Renting Corp.*, 286 App. Div. 123, 141 N.Y.S.2d 424 (1955), *aff'd mem.*, 1 N.Y.2d 750, 152 N.Y.S.2d 297 (1956); *Colorado Interstate Gas Co. v. Long*, 372 P.2d 220 (Okla. 1962).

246. *Brown v. Swineford*, 44 Wis. 282, 294 (1878).

control of the proceedings before him, regardless of what lawyers in the case do.²⁴⁷

When the trial judge acts, whether or not at the behest of a party, he cannot hope to mitigate prejudice unless he acts decisively. Prejudicial remarks, for instance, should be stopped with "fitting rebuke" from the bench; sustaining objections to them is not enough. "The least that a self-respecting court can do . . . is to stop such practice in the presence of the jury, and not allow it to proceed with simply a perfunctory sustaining of objections."²⁴⁸ Where the lawyer's conduct is reprehensible enough—the "golden rule" jury argument was in a recent Mississippi case²⁴⁹—the trial judge is justified in being emphatic when he rules on an objection to it, possibly he should explain to the jury, as Dean Wigmore suggested, the reason behind the rule which prevents the argument.²⁵⁰ Perfunctory or sarcastic instructions when prejudice arises have been condemned often enough²⁵¹ that trial judges should stand warned that they must take seriously the fiction of therapy by instruction, even when no one else does.

Not only should the trial judge act decisively, but he must act promptly. There is in appellate opinions sometimes a tacit²⁵² recognition and sometimes an express declaration²⁵³ that prejudicial misconduct is worse when it has time to set in. In two recent opinions, one from Rhode Island²⁵⁴ and one from Florida, trial judges have been reversed apparently because they failed to give therapeutic instructions at the time the prejudice occurred, the Florida court noting that "it has been uniformly held that the Court should act immediately to appropriately instruct the jury."²⁵⁵

There are, of course, situations where comment from the trial judge aggravates an already bad situation—comment on a casual mention of liability insurance seems to be an example. A Missouri trial judge

247. *Burnette v. Hernandez*, 263 F.2d 212 (9th Cir. 1959); *Brabeck v. Chicago & N.W. Ry.*, 117 N.W.2d 921 (Minn. 1962); *State v. Jansen*, 207 Minn. 250, 290 N.W. 557 (1940).

248. *Sullivan v. Collins*, 107 Wis. 291, 298, 83 N.W. 310, 313 (1900).

249. *Copiah Dairies, Inc. v. Addikson*, 153 So. 2d 689 (Miss. 1963).

250. *Ibid.*; 1 WIGMORE, EVIDENCE 250-51 (3d ed. 1940); *McJunkin v. Kiner*, 157 Pa. Super. 578, 43 A.2d 608 (1945).

251. *Colorado Interstate Gas Co. v. Long*, 372 P.2d 220 (Okla. 1962); *Surface v. Bentz*, 228 Pa. 610, 77 Atl. 922 (1910).

252. *Waldron v. Waldron*, 156 U.S. 361 (1895); *Rosa v. City of Chester*, 278 F.2d 876 (3d Cir. 1960); *Altenbaumer v. Lion Oil Co.*, 186 F.2d 35 (5th Cir. 1950); *McJunkin v. Kiner*, 157 Pa. Super. 578, 43 A.2d 608 (1945).

253. *Holmes v. Moffat*, 120 N.Y. 159, 24 N.E. 275 (1890); *contra*, *Smith v. Whitman*, 88 Mass. (6 Allen) 562 (1863), and authorities cited.

254. *Deighan v. E. Turgeon Constr. Co.*, 182 A.2d 446 (R.I. 1962).

255. *Seminole Shell Co. v. Clearwater Flying Co.*, 156 So. 2d 543, 545 (Fla. Dist. Ct. App. 1963).

showed admirable awareness of this danger when, after the offending lawyer made a prejudicial remark, and the offended lawyer repeated it in objecting, the judge said: "If the jury heard any such remark, they will disregard it."²⁵⁶ As Judge Frank said, "[T]he judge's cautionary instruction may do more harm than good: It may emphasize the jury's awareness of the censured remark—as in the story, by Mark Twain, of the boy told to stand in the corner and not think of a white elephant."²⁵⁷ Where the judge needlessly repeats the prejudicial language he may find that his brothers on the appellate bench think he did more harm than good; he may fare better if he says nothing.²⁵⁸

The trial lawyer sometimes "pulls down the house on his own head"²⁵⁹ and tempts the trial judge to be over-emphatic in an effort to preserve fairness. When that is the case, he gets small comfort in the appellate courts.²⁶⁰ An especially vociferous rejoinder from the judge is not only justified but is required if the conduct of the lawyer involved is seriously or deliberately prejudicial.²⁶¹ This seems to be especially true where the lawyer is ignoring the court's previous ruling on the subject.²⁶² On the other hand, jurors place great weight on the trial judge's attitude. Although he safely can be aggressive if he has accurately identified what the lawyer is doing, if he has mistaken the lawyer's tactics or if he misinterprets the law, his strong words are almost certain to result in reversal.²⁶³

2. Trial Judge Discretion

The discretion of a trial court, according to New Hampshire's Judge Doe, is another name for a question of fact that is not decided by the jury. When an appellate court defers to the judgment of a trial judge, and says it is doing so because the trial judge has "discretion" on the point, it is saying that a fact question is involved, and that the trial judge is in a better position to decide the fact—the fact of prejudice in

256. *McCandless v. Manzella*, 369 S.W.2d 188, 190 (Mo. 1963); see Broeder, *The University of Chicago Jury Project*, 38 NEB. L. REV. 774 (1959).

257. *United States v. Antonelli Fireworks Co.*, 155 F.2d 631, 656 (2d Cir. 1946) (dissenting opinion); see *McJunkin v. Kiner*, 157 Pa. Super. 578, 43 A.2d 608 (1945).

258. *Harper v. James*, 191 N.E.2d 504 (Ind. App. 1963); *Brown v. Parker*, 375 S.W.2d 594 (Mo. Ct. App. 1964); *Surface v. Bentz*, 228 Pa. 610, 77 Atl. 922 (1910).

259. *Hirshberger v. Sinning*, 21 Ohio App. 17, 22, 152 N.E. 908, 910 (1925).

260. *Darrow v. Pierce*, 91 Mich. 63, 51 N.W. 813 (1892); *Hein v. Mildebrant*, 134 Wis. 582, 115 N.W. 121 (1908). See generally, Annot., 94 A.L.R.2d 826, 857-60 (1964).

261. *Schafer v. Thurston Mfg. Co.*, 48 R.I. 244, 137 Atl. 2 (1927).

262. *Daudel v. Wolf*, 30 S.D. 409, 138 N.W. 814 (1912).

263. *United States v. Standard Oil Co.*, 316 F.2d 884 (7th Cir. 1963); *Atlantic Ref. Co. v. Jones*, 70 F.2d 89 (4th Cir. 1934); *Gagne v. Bertran*, 43 Cal. 2d 481, 275 P.2d 15 (1954); *Parris v. Deering S.W. Ry.*, 227 S.W. 1071 (Mo. Ct. App. 1921).

this context—than the appellate court is.²⁶⁴ This, at least, is a convenient way to analyze the problem of trial judge discretion in the context of jury prejudice, particularly when one reflects, with Professor James, that the verbal formulations involved have not changed since the 18th Century.²⁶⁵

Deference to a trial judge's finding of fact on jury prejudice is most immediately apparent in the cases affirming an order for new trial; there is a special judicial rule on declarations against interest at work in these cases. Appellate judges seem to assume that if the prejudice was so bad that the judge below is willing to impose the ordeal of another trial on himself, they ought to let him do it. The case where an issue of pure fact is decisive illustrates the point. In *Huffman v. Heagy*,²⁶⁶ the Florida court this year sustained an order for new trial entered after the judge found in the jury room a newspaper reporting the case. In *McCandless v. Manzella*,²⁶⁷ the Missouri court last year affirmed a new trial order based on the impact of prejudicial conduct—a side remark attributing Mafia influence to the plaintiff.

There is, however, a broader sort of appellate respect at work here—something nearer what Judge Doe had in mind when he equated trial judge discretion with fact-finding.²⁶⁸ In *Ward v. Hopkins*,²⁶⁹ for instance, the trial judge ordered a new trial because he was afraid that admonishing an erring lawyer would prejudice the verdict and aware that a failure to admonish him would be equally harmful. The appellate court deferred to this judge's ability to measure the tone of voice used by lawyers, the expression on the faces of the jurors, and all of the other factors that might have produced or indicated an unfair trial. In *King v. Chicago Ry.*,²⁷⁰ the Iowa court deferred to the trial judge's determination of the effect of improper impeaching testimony on much

264. Reid, *A Peculiar Mode of Expression (Judge Doe's Use of the Distinction Between Law and Fact)*, 1963 WASH. U.L.Q. 427, 429.

265. James, *Remedies for Excessiveness or Inadequacy of Verdicts*, 1 DUQUESNE L. REV. 143, 146 (1963).

266. 159 So. 2d 907 (Fla. Dist. Ct. App. 1964).

267. 369 S.W.2d 188 (Mo. 1963).

268. This is best illustrated by the wrangles that result when appellate judges try to guess what influenced a jury. In *Goforth v. Alvey*, 263 S.W.2d 313 (Tex. Civ. App. 1953), the trial judge had permitted a doubtful argument; the issue was what influence it had. The Court of Civil Appeals of Texas thought the argument prejudiced the verdict. The Supreme Court of Texas, three judges dissenting, disagreed and reversed. Altogether the supreme court used 13 pages of quotations from the record and protested at great length their conflicting views weighing, not the amount of prejudice, which would be hard enough to measure, but its effect on twelve other people. 153 Tex. 449, 271 S.W.2d 404 (1954).

269. 81 So. 2d 493 (Fla. 1955).

270. 138 Iowa 625, 116 N.W. 719 (1908).

the same ground. The appellate holdings which follow similar reasoning,²⁷¹ when contrasted with the infrequent case where the trial judge is reversed,²⁷² indicate that the attitudes displayed in these recent opinions are almost universal when an order granting a new trial is being reviewed.

The question is closer when the trial judge has denied a motion for new trial. But here again, when the issue turns on a finding of fact, appellate judges tend to defer to his judgment. In *Jones v. Cary*,²⁷³ for instance, the issue was whether the jurors heard a recess reference to liability insurance; the trial judge decided that they did not, and he was affirmed. In *Marshall v. State*,²⁷⁴ the issue was whether the jurors had been affected by the trial judge's suspending the defendant's lawyer from practice; the trial judge, who was affirmed, held that they had not. In *Sandeen v. Willow River Power Co.*,²⁷⁵ the issue was whether the jurors had been influenced by an attempted subornation; the trial judge, who was affirmed, held that they had not. In these cases, the ultimate issue was prejudice, but the narrow issue—the fact question—was whether a particular occurrence had an effect on the jury. In each case, the appellate judges deferred to the trial judge's determination of that fact; it is the trial judge who has his finger on the pulse of the situation, as the Maryland court put it.²⁷⁶ This result, of course, assumes that, if he applies any express fact-finding standard at all, the trial judge applies a standard approved by the appellate court. Mr. Justice Rutledge's opinion in the *Kotteakos*²⁷⁷ case, which might appear to contradict the generalization from these finger-on-the-pulse holdings, turns on the standard applied to determine the fact, rather than on the finding of fact itself.²⁷⁸

Where the issue is prejudice in a broader sense, or prejudice as a cumulative effect, appellate courts often defer to the trial judge's

271. *Roberts v. Hyland Builders Corp.*, 34 Ill. App. 2d 276, 181 N.E.2d 197 (1962); *Jacobson v. National Dairy Prods. Corp.*, 32 Ill. App. 2d 37, 176 N.E.2d 551 (1961); *Phillips v. Vrooman*, 361 Mo. 1098, 251 S.W.2d 626 (1952); *Greathouse v. Wolff*, 360 S.W.2d 297 (Mo. Ct. App. 1962); *Thomas v. Belingloph*, 362 S.W.2d 780 (Mo. Ct. App. 1962); *Nash v. Hiller*, 380 P.2d 77 (Okla. 1960).

272. *Neill v. McGinn*, 175 Neb. 369, 122 N.W.2d 65 (1963).

273. 219 Ind. 268, 37 N.E.2d 944 (1941).

274. 5 Tex. Crim. App. 273 (1878).

275. 214 Wis. 166, 252 N.W. 706 (1934).

276. *Bailey v. Wray*, 230 Md. 359, 187 A.2d 101 (1963); see *Commonwealth v. Donaducy*, 167 Pa. Super. 611, 76 A.2d 440 (1950); *Faber v. C. Reiss Coal Co.*, 124 Wis. 554, 102 N.W. 1049 (1905).

277. 328 U.S. 750 (1946).

278. *Fields v. Creek*, 21 Wis. 2d 562, 124 N.W.2d 599 (1963), suggests another kind of trial judge discretion. The court held the trial judge entitled to deference in allowing the side offended by prejudice to attempt to balance it.

finding of fact, but they apparently do it with somewhat less conviction. The impression is at times unavoidable that they use trial judge discretion as an excuse for avoiding a difficult decision.²⁷⁹ But the force of a plausible finding of no-prejudice at the trial level is potent before appellate judges and, excuse or not, the appellant who relies on prejudicial misconduct has an up-hill fight to reversal.²⁸⁰ The underlying rationale of this apparent reliance on trial judge discretion is not always a simple deference to a finding of fact. The appellate court often adds its own estimate of the weight of the evidence,²⁸¹ or its own assessment of the fairness of the verdict.²⁸²

In cases which do not support this generalization—those holding the trial judge abused his discretion—Judge Doe probably would have said that the trial judge made a finding of fact against the weight of the record. The cases suggest that this statement is a reasonable generalization.²⁸³ Especially where the prejudice has come about through an initially incorrect ruling by the trial judge (which he has attempted to correct with therapy by instruction), appellate courts are inclined to find against him. Here again, there is at work a judicial rule on declarations against interest.²⁸⁴

3. *The Problem of an Inadequate Record*

In his popular biography of Clarence Darrow,²⁸⁵ Irving Stone lamented the fact that American trial courts do not make records of jury speeches. In Darrow's case, this judicial oversight was an offense against literature. In the more prosaic milieu of modern trial practice it is an offense against the administration of justice and a refuge for appellate judges.

When appellate judges complain that they have an inadequate record they either mean that the record before them does not contain substantial portions of what went on before the jury, or that it contains only words and not the wordless color that lends meaning to the words.

279. *Burnett v. Bledsoe*, 159 So. 2d 841 (Ala. 1964).

280. *North Chicago St. Ry. v. Cotton*, 140 Ill. 486, 29 N.E. 899 (1892); *Connelly v. Nolte*, 237 Iowa 114, 21 N.W.2d 311 (1946); *State v. Gadbois*, 89 Iowa 25, 56 N.W. 1107 (1907); *Skeeters v. Skeeters*, 389 P.2d 313 (Ore. 1964); *Fields v. Creek*, 21 Wis. 2d 562, 124 N.W.2d 599 (1963).

281. *George, Weeks & Co. v. Swafford*, 75 Iowa 491, 39 N.W. 804 (1888); *Loncar v. National Fire Ins. Co.*, 84 Mont. 141, 274 Pac. 844 (1929); *Boyd v. Pernicano*, 385 P.2d 342 (Nev. 1963).

282. *Beck v. Wings Field, Inc.*, 122 F.2d 114 (3d Cir. 1941); *Wills v. J. J. Newberry Co.*, 43 Cal. App. 2d 595, 111 P.2d 346 (Dist. Ct. App. 1941).

283. *Ibid.*; *Lukich v. Angeli*, 31 Ill. App. 2d 20, 175 N.E.2d 796 (1961).

284. *Waldron v. Waldron*, 156 U.S. 361 (1895); *Hopt v. Utah*, 120 U.S. 430 (1887); *contra*, *Smith v. Whitman*, 88 Mass. (6 Allen) 562 (1863).

285. STONE, CLARENCE DARROW FOR THE DEFENSE (1941).

Neither observation is made with great frequency in the opinions. The latter, always applicable, probably is made most often in those cases in which the court is not disposed to reverse anyway. Often the trial judge himself will not be able to recall the details of a disputed incident well enough to rule intelligently on post-trial motions.²⁸⁶ Some judges or lawyers apparently attempt to correct the deficiency with unofficial recordings.²⁸⁷ Beyond that, there is a good deal of appellate guesswork.²⁸⁸ Some courts place the burden of demonstrating accuracy on the party resisting a new trial. In *Swift v. Wimberly*,²⁸⁹ a 1963 opinion of the Tennessee Court of Appeals, the defendant contended that the plaintiff's lawyer had asked the "usual questions" about liability insurance on voir dire examination and the appellate judges accepted this as fact because the plaintiff's lawyer, on appeal, did not show that it was not the fact. The case demonstrates, at least, that appellate judges are not prevented from ruling because of an inadequate record if they are minded to rule, even to the point of using mysterious devices for discovering facts not stated in the record. The Court of Civil Appeals of Texas last year complained that a record before it did not contain jury argument, then quoted part of the argument and ruled on it.²⁹⁰

The fact that the techniques of making trial records, even when all of the words are there, have not gone as far as Aldous Huxley's "feelies" is a more pervasive limitation.²⁹¹ It can be a plausible basis for deference to the trial judge; many of the older cases find appellate judges affirming a trial court's ruling on difficult questions of prejudice precisely because they are unable, on appeal, to decide what effect the prejudice had.²⁹² Modern courts show a realistic tendency to assume the worst. In *McCandless v. Manzella*,²⁹³ where remarks were made which suggested the sinister influence of the Mafia on the side of the plaintiff, the court assumed that the trial jury had heard the remarks,

286. *E.g.*, *Kane v. Sharples*, 28 Pa. Dist. 900 (1919), where the trial judge refused to rule on a post-trial motion based upon misconduct in an opening statement.

287. In *Colquett v. Williams*, 264 Ala. 214, 86 So. 2d 381 (1956), the jury speeches were tape recorded.

288. *E.g.*, *Pool v. Day*, 141 Kan. 195, 40 P.2d 396 (1935).

289. 370 S.W.2d 500 (Tenn. Ct. App. 1963); see *Williams v. City of Anniston*, 257 Ala. 191, 58 So. 2d 115 (1952).

290. *Graham v. Morris*, 366 S.W.2d 792 (Tex. Civ. App. 1963). *Contra*, *McCandless v. Sammons*, 50 Tenn. App. 413, 362 S.W.2d 259 (1961).

291. HUXLEY, *BRAVE NEW WORLD* 112-15 (Bantam ed. 1960).

292. *McLain v. Atlas Assur. Co.*, 67 S.W.2d 849 (Mo. Ct. App. 1934); *Ogilvie v. Kansas City Pub. Serv. Co.*, 27 S.W.2d 733 (Mo. Ct. App. 1930); *Henry v. Huff*, 143 Pa. 548, 22 Atl. 1046 (1891); *Schafer v. Thurston Mfg. Co.*, 48 R.I. 244, 137 Atl. 2 (1927); *Dennis v. Hulse*, 362 S.W.2d 308 (Tex. 1962).

293. 269 S.W.2d 188, 190 (Mo. 1963).

even though the judge instructed the jury to disregard "any such remark" if they had heard it.

Whatever devices appellate judges use, inadequacies of record generally have not proved an obstacle to appellate review of prejudicial conduct. As an excuse for affirming, limitation of the record occurs far less often than absence of objection below, or therapeutic instruction given by the trial judge. This is largely because the lack of specific language is supplied by uncontroverted bills of exception,²⁹⁴ or by the agreement of counsel for both sides in the appeal,²⁹⁵ or by the trial judge's account of what happened in a memorandum opinion written to rule on post-trial motions.²⁹⁶ Instances of controversy between the lawyers involved are surprisingly rare.²⁹⁷ When controversy does occur, appellate judges often presume against prejudice in the absence of clear record proof that it occurred.²⁹⁸ "[W]hen the record comes to this court bearing the official sanction of the trial judge. . . . [E]very reasonable presumption must be indulged in that the trial judge has performed his duty . . . unless such misconduct and its prejudicial nature are clearly shown by the record."²⁹⁹ Lawyers can, of course, obtain full records of voir dire questions and jury arguments, if their clients are willing to bear the expense of an extra reporter. The Iowa court, in *Connelly v. Nolte*,³⁰⁰ rather pointedly warned the profession, however, that records must be complete if they are prepared under the auspices of a party; in that case the court refused to consider the transcript of only one side of the jury argument.

C. Solutions in the Appellate Court

When all of the escape valves have been closed the appellate court's problem in a prejudiced verdict case is to find a remedy that will satisfy both justice and effective administration. The traditional appellate remedy—reversal for a full-dress retrial—is a burdensome expense in states where personal injury trial dockets back up for five years or

294. *Swift v. Wimberly*, 370 S.W.2d 500 (Tenn. Ct. App. 1963); *Waterman v. Chicago & Alton R.R.*, 82 Wis. 613, 52 N.W. 247 (1892).

295. *Williams v. City of Anniston*, 257 Ala. 191, 58 So. 2d 115 (1952).

296. *Colquett v. Williams*, 264 Ala. 214, 86 So. 2d 381 (1956).

297. See, however, *Schafer v. Thurston Mfg. Co.*, 48 R.I. 244, 137 Atl. 2 (1927), where the appealing lawyers could not agree on their recollections of what the trial judge said. The court affirmed, relying both on the inadequacy of the word record and on the fact that it could not know the circumstances in which the words were spoken.

298. *McLain v. Atlas Assur. Co.*, 67 S.W.2d 849 (Mo. Ct. App. 1934); *Ogilvie v. Kansas City Pub. Serv. Co.*, 27 S.W.2d 733 (Mo. Ct. App. 1930); see generally, Annot., 94 A.L.R.2d 826 (1964).

299. *North Chicago St. Ry. v. Cotton*, 140 Ill. 486, 503, 29 N.E. 899, 904 (1892).

300. 237 Iowa 114, 21 N.W.2d 311 (1946).

more. The situation encourages the development of less sweeping appellate remedies, such as the remittitur or the new trial confined to the question of damages.³⁰¹

The new trial on damages is a relatively recent development.³⁰² The courts in most early cases, when faced with a record which indicated a distorted verdict and either a clear case of liability, or a fair jury case fairly tried, remanded for a new trial on all issues.³⁰³ More recently, a number of cases have displayed increased respect for a new trial limited to the assessment of damages,³⁰⁴ and the Federal Rules of Civil Procedure specifically permit the device.³⁰⁵ Illinois cases provide an interesting example of the development of a rule under which dissatisfied litigants like Melvin Cline are willing to seek review of the adequacy of their verdicts with less fear of risking a new trial on the merits. (The risk is not entirely gone, of course. No jurisdiction, apparently, permits an appeal which limits the issue to damages. That sort of appeal might become possible if modern reform toward separating damages and liability *ab initio* gains a significant following.) As recently as 1955, the Illinois Supreme Court thought that a reversal for retrial on damages alone impaired the litigant's right to jury trial as much as additur would have.³⁰⁶ But the same court, two years later, overcame its early fears and held that, if damages are inadequate or excessive, the weight of authority permits a new trial confined to the issue of damages. The appellate court had endorsed the rule in principle but refused to apply it because it thought the record demonstrated a compromise of the liability issue; the supreme court disagreed and ordered a new trial on damages only. The principle now seems fully established in New Hampshire, Minnesota, Rhode Island, and in the federal courts, and is gaining increased respect in other states.³⁰⁷

301. See James, *Remedies for Excessiveness or Inadequacy of Verdicts*, 1 DUQUESNE L. REV. 143 (1963) for a recent and valuable discussion of remittitur and additur.

302. Wilson, *The Motion for New Trial Based on Inadequacy of Damages Awarded*, 39 NEB. L. REV. 694 (1960). Mr. Wilson believes that most states will not permit the device, but that most appellate judges are inclined to honor the trial judge's decision as to whether it should be used.

303. *Gordon v. Checker Taxi Co.*, 334 Ill. App. 313, 79 N.E.2d 632 (1948), and authorities cited at 635; 325 Ill. App. 694, 60 N.E.2d 644 (1945); *Browder v. Beckman*, 275 Ill. App. 193 (1934).

304. *E.g.*, *Hose v. Hake*, 412 Pa. 10, 192 A.2d 339 (1963); Wilson, *supra* note 302.

305. FED. R. CIV. P. 59(a): "A new trial may be granted to all or any of the parties on all or part of the issues. . . ."

306. *Paul Harris Furniture Co. v. Morse*, 7 Ill. App. 2d 452, 130 N.E.2d 16 (1955), *rev'd in part*, 10 Ill. 2d 28, 139 N.E.2d 275 (1957). The appellate court had been permitting limited new trials at least since 1955. *Hong v. Williams*, 6 Ill. App. 2d 456, 128 N.E.2d 655 (1955). See also *O'Brien v. Howe*, 30 Ill. App. 2d 419, 174 N.E.2d 905 (1961); *Kinsell v. Hawthorne*, 27 Ill. App. 2d 314, 169 N.E.2d 678 (1960).

307. *Rosa v. City of Chester*, 278 F.2d 876 (3d Cir. 1960); *George v. Smith*, 105 N.H. 100,

It is appropriate where the award has been swelled by prejudice,³⁰⁸ as well as—and this sort of case is more typical—where prejudice has reduced the award.³⁰⁹ It is justified when the liability issues are so clearly established by the evidence that appellate judges consider them beyond dispute,³¹⁰ as well as in cases where the court feels that the liability case was presented fairly and the verdict on liability has not been affected by prejudice.³¹¹ Of course, the measurement of prejudice and the effect of prejudice is a precarious science, particularly in distinguishing between the effect prejudice had on liability and the effect it had on injury; there is some tendency to respect trial judges when they make an advertent determination of that fact issue.³¹²

If the verdict indicates to the appellate judges a compromise on the issue of liability, neither remittitur nor a new trial on damages is appropriate.³¹³ This distinction accounted for some of the early decisions which refused to adopt a rule permitting limited new trials,³¹⁴ and it accounts now for decisions in which a new trial is ordered on all issues.³¹⁵ The test, imprecise as so many tests are when appellate judges deal with prejudice, is whether or not the improper information or conduct was a substantial factor in producing the jury's decision on damages, as distinguished from its determination of liability.³¹⁶ At least in cases where the issue is whether or not the verdict has been increased by prejudicial factors, a new trial confined to damages promises an alternative to judges who feel that reversal is the only fair result, but who are unwilling to make jurors of themselves and assess a fair award through ordering a remittitur.³¹⁷ Of course, there is no

193 A.2d 16 (1963); *Blacktin v. McCarthy*, 231 Minn. 303, 42 N.W.2d 818 (1950); *Silveira v. Murray*, 192 A.2d 18 (R.I. 1963); see *Wilson*, *supra* note 302.

308. *Rosa v. City of Chester*, *supra* note 307.

309. See Part I-B, *supra*; *O'Brien v. Howe*, 30 Ill. App. 2d 419, 174 N.E.2d 905 (1961); *Wihr v. Bruno's Appliances Sales and Serv., Inc.*, 29 Ill. App. 2d 145, 172 N.E.2d 633 (1961).

310. *Wihr v. Bruno's Appliances Sales and Serv., Inc.*, *supra* note 309; *Blacktin v. McCarthy*, 231 Minn. 303, 42 N.W.2d 818 (1950).

311. *Stroyeck v. A. E. Stanley Mfg. Co.*, 26 Ill. App. 2d 76, 167 N.E.2d 689 (1960).

312. *E.g.*, *ibid.*

313. *Wilson*, *supra* note 302; *James*, *supra* note 301.

314. *E.g.*, *Luner v. Gelles*, 314 Ill. App. 659, 42 N.E.2d 313 (1942).

315. *Kinsell v. Hawthorne*, 27 Ill. App. 2d 314, 169 N.E.2d 678 (1960); *Blacktin v. McCarthy*, 231 Minn. 303, 42 N.W.2d 818 (1950); see *Rosa v. City of Chester*, 278 F.2d 876 (3d Cir. 1960).

316. *Rosa v. City of Chester*, *supra* note 315, relying in part on *Kottaekos v. United States*, 328 U.S. 750 (1946). *Yerrick v. East Ohio Gas Co.*, 198 N.E.2d 472 (Ohio Ct. App. 1964), confines the data for consideration as to remittitur to the record and refuses to consider verdicts in similar cases.

317. *Wilson*, *supra* note 302; see *Waterman v. Chicago & Alton R.R.*, 82 Wis. 613, 52 N.W. 247 (1892), for the reverse situation. With rejection of additur as an impairment of the right to jury trial see *State Highway Comm'n v. Schmidt*, 391 P.2d 692 (Mont.

compelling reason against a court's ordering a new trial confined to damages (in lieu of a complete new trial) conditioned on remittitur.³¹⁸

D. *The Discipline of the Bar*

1. *The Myth of Good Faith*

If courts are to continue to be places where justice is judicially administered, causes must be fairly presented and fairly defended, and the duty of counsel in this regard is not less important nor less imperative than that of the judge.³¹⁹

There is a superficial analogy between the lawyer in a civil lawsuit who indulges in emotional drama for the benefit of a jury, or who attempts by direct or covert means to bring incompetent evidence to the jury's attention, and the police official who seizes evidence after an illegal arrest or searches a suspect's home or automobile without a warrant. There is a not so rational judicial response to these situations which has translated a disapproval of methods into disapproval on the merits of the cause before the court. It is now a general rule of constitutional law that criminal evidence seized in violation of the Bill of Rights cannot be admitted against an accused; and, if it is admitted, the trial judge commits reversible error. To a less pervasive extent, appellate courts in civil lawsuits, faced with a calculating campaign to improperly influence jurors, often have been convinced that the solution was a reversal on the merits.

Still, the analogy is only superficial. The exclusionary rule of evidence which has become a matter of constitutional law in criminal cases is based on the assumption that society can discipline its police. The tendency of appellate judges to punish a civil client for his lawyer's breach of ethics assumes that the loss of cases will cause lawyers to behave. The assumption probably is unrealistic, but whether it is or not, the civil client cannot discipline his lawyer as society can discipline its police.

The appellate judge's penchant for visiting on a litigant the sins of his lawyer presents itself in enforcing rules of evidence in civil cases even more often than constitutional exclusion arises in criminal cases—and with no more logic, incidentally, than client punishment has when it arises in routine matters of judicial administration.³²⁰ If, as

1964). A new trial limited to the issue of damages is apparently the only orthodox alternative to a full-dress retrial.

318. See, e.g., *Sandeen v. Willow River Power Co.*, 214 Wis. 166, 252 N.W. 706 (1934).

319. *Saxton v. Pittsburg Rys.*, 219 Pa. 492, 495, 68 Atl. 1022, 1023 (1908) (Fell, J.).

320. See, e.g., *Link v. Wabash R.R.*, 370 U.S. 626 (1962).

the Vermont court once stated, "incompetent and immaterial testimony is offered, with knowledge of its character, and for the purpose of prejudicing the jury. . . ." the lawyer's conduct is "such an offense against orderly procedure and good practice that it constitutes reversible error."³²¹ This is the myth of good faith. If all of the elements of intentional misconduct are met—improper evidence or conduct, guilty knowledge and *mens rea*—the sanction is justified. The anomaly is that, once the case against the lawyer is established, the punishment is visited on his client; and, despite the amount of prejudice involved, if the improper appeal to the jury is engaged in innocently, the injured litigant must suffer it, protected only by the unlikely satisfaction he enjoys in knowing that the heart of his opponent's lawyer is pure.³²²

Some courts have been surprisingly candid about the use of reversal as a sanction for unethical advocacy. "It is only wilful and intentional misconduct of an attorney," the Oregon court said, "that carries the penalty of a mistrial."³²³ Persistent and illicit passion in jury speeches, the Illinois court said, "is, of itself, sufficient reason for granting a new trial."³²⁴ On the other hand, a little bit of prejudice is not enough for mistrial, provided there attaches to it the benefit of the doubt that bench should accord to bar. Even though any mention of liability insurance, for instance, is something jurors attend to and remember,³²⁵ a mistrial is improper if the lawyer's mention of it is casual or inadvertent as distinguished from "artful rather than artless."³²⁶

"[I]mproper questions are sometimes asked in good faith, without any sinister motive,"³²⁷ to be sure, but the effect on the mind of the

321. *Paul v. Drown*, 108 Vt. 458, 461-62, 189 Atl. 144, 146 (1937).

322. *Ibid.*; *Foster v. Sheperd*, 258 Ill. 164, 101 N.E. 411 (1913).

323. *Dermody v. Fanning*, 153 Ore. 392, 394, 56 P.2d 1150, 1151 (1936). *But see Skeeters v. Skeeters*, 389 P.2d 313, 327 (Ore. 1964):

The granting of a mistrial on this ground is not to punish counsel . . . but to insure the defendant an unprejudiced determination of his liability. In *Walker v. Texas Employers' Ins. Ass'n*, 155 Tex. 617, 622, 291 S.W.2d 298, 302 (1956), the court said reversal was not justified by misconduct unless the misconduct "caused the jury to return a different verdict."

324. *Bale v. Chicago Junction Ry.*, 259 Ill. 476, 480, 102 N.E. 808, 809 (1913).

325. Broeder, *The University of Chicago Jury Project*, 38 NEB. L. REV. 744 (1959); in 30 trials conducted in the Chicago jury project, and reported by Professor Broeder: (a) when insurance was mentioned without objection or furor, the average verdict was \$37,000; (b) when the defendant said he had no insurance, the average verdict was \$33,000; (c) when the defendant said he had insurance, and there was an objection entered, and the court instructed the jurors to disregard insurance, the average verdict was \$46,000.

326. *William Cameron Co. v. Downing*, 147 S.W.2d 963, 966 (Tex. Civ. App. 1941).

327. *State v. Gadbois*, 89 Iowa 25, 33, 56 N.W. 272, 275 (1893); the defendant in that case, as he whiled away his prison sentence, must have taken great comfort in the fact that, although improper questions may have caused the jury to put him in jail, the asker

laymen called from the street to find the truth, on competent evidence, may well be the same as if they were asked from the blackest motive. The relevant causal relation is too often one between reversals of civil judgments and the more orderly conduct of trials on the one hand, and between unethical behavior and prejudiced verdicts on the other. In Tennessee, for instance, there is apparently a solidified appellate rule that insurance questions on voir dire do not raise material for mistrial if they are asked in good faith, but that the "usual questions" asked in bad faith, or persisted in after objection, justify mistrial—and this is quite aside from the amount of prejudice the conduct probably produces in the minds of the jurors.³²⁸

Most of the appellate use of reversal and mistrial as a sanction for bad advocacy is more subtle than Tennessee's voir dire insurance rule. Typically comment on these sanctions is confined to dicta in opinions to the effect that only "calculated" impropriety is bad enough to justify mistrial, or so bad that therapeutic instructions will not cure it.³²⁹ Suggestions of liability insurance in an accident case, or of workmen's compensation in an employee's negligence action against a third party, if they are engaged in ignorantly or casually, are considered less serious than suggesting that the opposing litigant is associated with the Mafia.³³⁰ And this is not because the estimated effect of insurance is less potent than the estimated effect of organized crime, but because it is less likely that an irrelevant fact is mentioned with a pure motive.

Another crystallization of good faith is the "color of right" rule—if the lawyer injects prejudice into the record under a color of right, the sanction of reversal is not justified (regardless of what the jury thinks). The whole business of good faith puts a premium on daring; the "color of right" refinement puts a premium on ignorance. In *Burnett v. Bledsoe*, for example, the Alabama court had before it this

of the questions acted without malice. See also *Cook v. Latimer*, 274 Ala. 283, 147 So. 2d 831 (1962); *Schaefer v. Noble*, 18 App. Div. 2d 962, 238 N.Y.S.2d 331 (1963).

328. *Swift v. Wimberly*, 370 S.W.2d 500 (Tenn. Ct. App. 1963); *Woods v. Meacham*, 46 Tenn. App. 711, 333 S.W.2d 567 (1959); see also Annot., 4 A.L.R.2d 761 (1949); Walker, *The Problem of Indemnity Insurance in Damage Actions as Answered by the Courts of California*, 11 So. CAL. L. REV. 407 (1938).

329. *Price v. King*, 122 N.W.2d 318 (Iowa 1963); *Stewart v. Hilton*, 247 Iowa 988, 77 N.W.2d 637 (1956); *Swanson v. Evans Oil Co.*, 12 App. Div. 2d 875, 209 N.Y.S.2d 860 (1961); *G., C. & S.F. Ry. v. Levy*, 59 Tex. 542 (1883).

330. *McCandless v. Manzella*, 369 S.W.2d 188 (Mo. 1963); see *Moniz v. Bettencourt*, 24 Cal. App. 2d 718, 76 P.2d 535 (1938); *Clark v. Piccillo*, 75 N.J. Super. 123, 182 A.2d 381 (Super. Ct., App. Div. 1962); *Perry v. Public Serv. Coordinated Transp.*, 136 N.J.L. 398, 56 A.2d 617 (Sup. Ct. 1948); *Brown v. Parker*, 375 S.W.2d 594 (Mo. Ct. App. 1964); *Stygles v. Ellis*, 123 N.W.2d 348 (S.D. 1963); *Gianini v. Cerini*, 100 Wash. 687, 171 Pac. 1007 (1918); Annot., 94 A.L.R.2d 826 (1964).

question in a personal injury case: "Mr. Edgar, do you recall Reubin Burnett saying there at the scene to Laverne Bledsoe, 'Don't worry about it I have \$10,000 worth of insurance?'"³³¹ The excuse for that question was that it bore on the sanity of the defendant Burnett. That was sufficient color of right for the Alabama Supreme Court, which affirmed a verdict for exactly \$10,000. In *Stygles v. Ellis*,³³² the court warned the plaintiff's lawyer, in chambers, not to mention the fact that an impeaching statement had been taken by an insurance adjuster; the warning was circumvented by repeated reference to "a person that must remain anonymous," and that proved to be enough good faith to avoid reversal.

Sometimes the color of right doctrine has solidified into a rule of trial practice. In New Jersey cases involving workmen's claims against third parties, it was, for 15 years, permissible to raise the fact of workmen's compensation from the worker's employer because that information was relevant to the plaintiff's inclination to return to work.³³³ In a 1962 opinion, the New Jersey court prospectively repudiated the rule, but found a justified color of right in the record before it.³³⁴ (Of course, if an insurance company is a proper party, reference to it is unavoidable, whatever conjecture that may produce in the minds of jurors.³³⁵)

There is probably no more persuasive indication of the weight appellate judges have placed on the illegitimate issue of good faith than the fact that the traditional bars to reversal—absence of objection and therapeutic instruction—have been frequently abandoned or ignored in cases involving prejudice plus *mens rea*. Effective control over prejudice is for the lawyer and not for the judge, and it is logical to conclude that therapeutic instructions frequently will not cure the prejudice resulting from the lawyer's shortcomings. There are cases which recognize this, but conclude that the instruction is inefficacious only where the lawyer acts with an impure heart.³³⁶ In other words, admonition

331. 159 So. 2d 841, 842 (Ala. 1964).

332. 123 N.W.2d 348 (S.D. 1963).

333. *Perry v. Public Serv. Coordinated Transp.*, 136 N.J.L. 398, 56 A.2d 617 (Sup. Ct. 1948).

334. *Clark v. Piccillo*, 75 N.J. Super. 123, 182 A.2d 381 (Super. Ct., App. Div. 1962).

335. *Price v. King*, 122 N.W.2d 318 (Iowa 1963).

336. *C. M. Spring Drug Co. v. United States*, 12 F.2d 852 (8th Cir. 1926); *United States v. Jones*, 32 Fed. 569 (D.S.C. 1887); *Bale v. Chicago Junction Ry.*, 259 Ill. 476, 102 N.E. 808 (1913); *Swanson v. Evans Oil Co.*, 12 App. Div. 2d 875, 209 N.Y.S.2d 860 (1961); *Nash v. Hiller*, 380 P.2d 77 (Okla. 1963); *Houston v. Pettigrew*, 353 P.2d 489 (Okla. 1960); *Kloppenburg v. Kloppenburg*, 66 S.D. 174, 280 N.W. 209 (1938); *Conwell v. Milwaukee Auto. Mut. Ins. Co.*, 19 Wis. 2d 298, 120 N.W.2d 68 (1963); *Schober v. City of Milwaukee*, 18 Wis. 2d 591, 119 N.W.2d 316 (1963); *Smith v. Russ*, 22 Wis. 439 (1868).

from the trial judge cures prejudice if the lawyer involved acts either innocently or under claim of right, but it does not work if he acts with calculated desire to prejudice.

The same distinction frequently arises in cases where the appellate court could refuse reversal because the party injured by prejudice did not make a record.³³⁷ Although some of these opinions justify the distinction by saying that objection is not necessary because a ruling on the objection would not cure the prejudice,³³⁸ most of them do not bother to explain why it is that absence of objection prevents reversal except where bad faith appears in the conduct of the appellee's lawyer.³³⁹

When good faith in the advocate is made the determinative issue on appeal, a question of primary importance is the means appellate judges use to determine the presence or absence of good faith. Generally the cases fall into one of two categories, those in which the opinions either state or imply that bad faith is an unavoidable conclusion from the record, and those in which the opinion-writer concludes that bad faith is not an unavoidable conclusion from the record and that the advocate should be given the benefit of a doubt. In other words (to relate this specific finding process to the basic issue involved in this sort of appeal), if the lawyer has acted so clearly or so repeatedly that the appellate judge cannot avoid the conclusion that his motives were corrupt, then the lawyer's client must suffer the expense and risk of a new trial, and the opposing lawyer's client gets a second chance. If the appellee's lawyer, on the other hand, acted innocently, or under claim of right, or if his conduct was so ambiguous that good faith is a tenable conclusion, his client avoids the expense and risk of a new trial and the opposing lawyer's client suffers the consequence of what might be a prejudiced verdict. These opinions often do not deny the verdict may have been prejudiced. They merely say (hold?) that, prejudice or not, the absence of bad faith on the record is enough to justify affirming.

Typically the opinions in the first category above conclude that the lawyer involved could not have acted as he did if he had good motives.³⁴⁰ This may be because a series of isolated incidents—any one

337. *Gordon v. Checker Taxi Co.*, 334 Ill. App. 313, 79 N.E.2d 632 (1948). *Contra*, *Kantor v. Ash*, 215 Md. 285, 137 A.2d 661 (1958).

338. *Cook v. Latimer*, 274 Ala. 283, 147 So. 2d 831 (1962); *Connelly v. Nolte*, 237 Iowa 114, 21 N.W.2d 311 (1946).

339. *Klotz v. Sears, Roebuck & Co.*, 267 F.2d 53 (7th Cir.), *cert. denied*, 361 U.S. 877 (1959); *Ryan v. Monson*, 33 Ill. App. 2d 406, 179 N.E.2d 449 (1961).

340. *E.g.*, *Paul v. Drown*, 108 Vt. 458, 189 Atl. 144 (1937).

of which appears innocent—demonstrate bad motive when viewed cumulatively. In *William Cameron Co. v. Downing*,³⁴¹ for instance, a lawyer made repeated references to liability insurance, any one of which might have been taken to be inadvertent. In *Foster v. Shepherd*,³⁴² where prejudicial conduct occurred on a retrial, and it was the same kind of conduct which occurred the first time the case was tried, the appellate judges reversed. More commonly, courts only discuss the issue in passing, characterizing the conduct of the lawyer below as having had an "obvious purpose," and that a bad one,³⁴³ or as having had "the apparent purpose of gaining a prejudicial advantage rather than simply to bring the position of the witnesses into proper perspective and relationship."³⁴⁴ Often the impropriety is obvious. In *Swanson v. Evans Oil, Inc.*, the court thought the lawyer had propounded a question "which he must be assumed to know cannot be properly answered"³⁴⁵ (in that case a question of workmen's compensation coverage in a suit against a non-employer tort-feasor). A recent civil assault and battery case contained this fatal exchange:

Mr. Yonke: I wonder if we have the Mafia running all through this case.

Mr. Russell: I object and ask the jury to disregard the remark of counsel pertaining to the Mafia.

The Court: If the jury heard any such remark they will disregard it.³⁴⁶

If the record is more ambiguous than this, the usual disposition is to refuse a finding of bad faith. Lawyers usually can press their advantage before a jury "to the verge of indiscretion" and avoid the finding of "wilful and intentional misconduct."³⁴⁷

The kernel of common sense in this rule of sanction is that the power to control prejudice effectively more often resides in the lawyer than in the judge. "[E]rrors which have a long and dishonorable tradition in jury trials"³⁴⁸ are usually the product of calculated campaigns of prejudice, and striking the lawyer in the pocketbook might be an effective way to stop them, not because of professional idealism, but because the kind of judicial waste illustrated by the *Cline* case is

341. 147 S.W.2d 963 (Tex. Civ. App. 1941).

342. 258 Ill. 164, 101 N.E. 411 (1913).

343. *Schaefer v. Noble*, 18 App. Div. 2d 962, —, 238 N.Y.S.2d 331, 333 (1963).

344. *Guardado v. Navarro*, 47 Ill. App. 2d 92, —, 197 N.E.2d 469, 474 (1964).

345. 12 App. Div. 2d 875, —, 209 N.Y.S.2d 860, 862 (1961).

346. *McCandless v. Manzella*, 369 S.W.2d 188, 190 (Mo. 1963).

347. *Santee v. Haggart Constr. Co.*, 202 Minn. 361, 363, 278 N.W. 520, 521 (1938); *Dermody v. Fanning*, 153 Ore. 392, 394, 56 P.2d 1150, 1151 (1936).

348. *Durkin v. Lewitz*, 3 Ill. App. 2d 481, 495, 123 N.E.2d 151, 158 (1954).

something a busy, accident-prone society cannot afford. If lawyers are brought to responsibility, by any means, the situation will improve. The trouble is that the assumption is unrealistic. Visiting the sins of lawyers on their clients has not improved the level of trial advocacy (if the number of appeals and of appellate opinions involving misconduct by lawyers is any indication). A trial lawyer who consistently practices questionable trial tactics can afford the risk better than his client can. In the *Cline* case, for instance, the appellant recovered \$30,000, despite defense conduct which the appellate court found to be prejudicial. It was undoubtedly a difficult decision—something Cline's lawyer called "the long draw"—to appeal that verdict and ask for a new trial on the issue of damages. Improper conduct in that case could have paid off for the defendants; over a trial lawyer's career, it may pay off frequently enough that the unethical trial lawyer can well afford an occasional loss. The pity is that clients can win or lose only once; and courts sit to do justice for clients.³⁴⁹

Appellate courts are disposed only occasionally to use the sanction of mistrial or reversal as an instrument for disciplining lawyers when the record does not manifest prejudice. In most cases prejudice is fairly clear on the record; reversal for new trial is a just result. The injustice occurs when one reflects that reversal probably would not have occurred if the lawyer's motives—not his conduct—had been a little purer, or at least a little more ambiguous, than they were. (Occasionally, courts have deferred to a trial judge's determination of good or bad faith; this might occur more often than it does if trial judges made a record on the point.³⁵⁰)

A substantial number of reported opinions have rejected outright the good-faith measure for determining whether a new trial should be ordered, and an even more substantial number have stated that good faith, although relevant, is not something that can be considered without also considering the possibility of prejudice. This sort of opinion often includes criticism of the lawyer involved or stern lectures on the duties of trial advocates.³⁵¹ Cases often contain a terse if not cryptic statement that reversal is not justified in the absence of prejudice, regardless of what the lawyer did,³⁵² hinting that bad faith makes a better case for reversal than good faith does.³⁵³ These courts

349. The *Cline* case is discussed in Part I-B, *supra*.

350. *Stewart v. United States*, 211 Fed. 41 (9th Cir. 1914); *State v. Gadbois*, 89 Iowa 25, 56 N.W. 272 (1893).

351. *Henry v. Huff*, 143 Pa. 548, 22 Atl. 1046 (1891).

352. *Burnett v. Bledsoe*, 159 So. 2d 841 (Ala. 1964); *Indian Ref. Co. v. Crain*, 280 Ky. 112, 132 S.W.2d 750 (1939).

353. *Woods v. Meacham*, 46 Tenn. App. 711, 333 S.W.2d 567 (1959).

would not go as far, in other words, as the broad principles stated by Mr. Justice Rutledge would require:

To weigh the error's effect against the entire setting of the record without relation to the verdict or judgment would be almost to work in a vacuum. . . . The question is, not were they right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had or reasonably may be taken to have had on the jury's decision. The crucial thing is the impact of the thing done wrong on the minds of other men. . . . The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence.³⁵⁴

Bad faith is not altogether irrelevant, but it never should be enough, standing by itself, to justify reversal.³⁵⁵

A smaller group of courts appear to have gone all the way. These courts have rejected the idea that the state of a lawyer's conscience is relevant in deciding whether the appellant was deprived of a fair trial. (In this sense, the term appealing party should include appellees who are defending a trial judge's decision granting a new trial.) "[I]n the conduct of a trial this court is concerned with the question of whether or not the defeated party received a fair trial," was the guide set in Illinois in 1953,³⁵⁶ and the guide appears to have had a certain lasting effect.³⁵⁷ (But even in that case, the court said, bad faith conduct on the part of the lawyer raised a presumption of an unfair trial, justifying reversal "unless it can be seen that it did not result in injury."³⁵⁸) The Iowa court, as long ago as 1946, stated that it did not consider bad conduct enough to justify a new trial, but would require an affirmative showing of prejudice. The court ominously added that it had machinery available to deal with erring lawyers.³⁵⁹

Probably the most two-fisted rejection of the good-faith test in

354. *Kotteakos v. United States*, 328 U.S. 750, 764-65 (1946).

355. See *Fields v. Creek*, 21 Wis. 2d 562, 124 N.W.2d 599 (1963), especially the dissenting opinion at 124 N.W.2d 605; and *Cook v. Latimer*, 274 Ala. 283, 147 So. 2d 831 (1962); *McCandless v. Manzella*, 369 S.W.2d 188 (Mo. 1963). See also *Huffman v. Heagy*, 159 So. 2d 907 (Fla. Dist. Ct. App. 1964); *Conwell v. Milwaukee Auto. Mut. Ins. Co.*, 19 Wis. 2d 298, 120 N.W.2d 68 (1963).

356. 414 Ill. 210, 214, 111 N.E.2d 142, 144 (1953).

357. *Bulleri v. Chicago Transit Authority*, 41 Ill. App. 2d 95, 190 N.E.2d 476 (1963); *Shafer v. Northside Inn, Inc.*, 44 Ill. App. 2d 86, 194 N.E.2d 5 (1963); *Roberts v. Hyland Builders Corp.*, 34 Ill. App. 2d 276, 181 N.E.2d 197 (1962); *Jacobson v. National Dairy Prods. Corp.*, 32 Ill. App. 2d 37, 176 N.E.2d 551 (1961); see *Wilczewski v. American Cent. Ins. Co.*, 339 Ill. App. 576, 90 N.E.2d 569 (1950); cf. 4 JONES, EVIDENCE 1679 (Gard ed. 1958).

358. 414 Ill. 210, 214, 111 N.E.2d 142, 144 (1953).

359. *Connelly v. Nolte*, 237 Iowa 114, 21 N.W.2d 311, 319 (1946).

reviewing prejudice came this year from the Supreme Court of Oregon. In *Skeeters v. Skeeters*, the court had before it the common question of liability insurance, and a demand for reversal because the plaintiff had injected that issue into the case. "The granting of a mistrial on this ground," the court said, "is not to punish counsel for having asked an improper question but to insure the defendant an unprejudiced determination of his liability."³⁶⁰ Not only that, the court said, but the determination of the question ought to rest in the normal case with the trial judge.

In this discussion, the issue of good faith is distinct from the issue of impact; but good faith sometimes can be bound up in the impact that a prejudicial fact or assertion has on jurors. In Illinois, for instance, the supreme court has developed the crystallized rule that improper mention of a murder victim's family vitiates the conviction of an accused murderer. This court recently recognized that the impact information has on the jury may vary with the amount of certitude with which it is presented. Family facts, if "elicited incidentally," may not have the impact on the jury that the same information would have when "presented in such a manner as to cause the jury to believe it is material."³⁶¹ This is not really an issue of good faith conduct at all; it is a matter of impact, measured according to the force with which an improper fact is presented to the jury.³⁶² Alternatively, if impact is made the test, appellate courts probably will have to recognize that patently prejudicial tactics may produce a reverse effect on the jury; juries might develop their own means of dealing with unethical lawyers.³⁶³

2. *Direct Discipline of the Bar*

To say that bad faith ought not to be relevant in deciding whether an appealing litigant has been deprived of a fair trial hardly is to approve the conduct itself. It is merely an argument for a more effective means of dealing with the bad conduct. Reversals are demonstrably ineffective in reducing it. The conduct which has produced this line of cases almost always violates the canons of ethics promulgated by the nationally-organized profession. It also violates specific articles in the

360. 389 P.2d 313, 327 (Ore. 1964).

361. *People v. Bernette*, 30 Ill. 2d 359, —, 197 N.E.2d 436, 443 (1964).

362. *Bulleri v. Chicago Transit Authority*, 41 Ill. App. 2d 95, 190 N.E.2d 476 (1963); *Durkin v. Lewitz*, 3 Ill. App. 2d 481, 123 N.E.2d 151 (1954); *Biniakiewicz v. Wojtasik*, 339 Ill. App. 574, 90 N.E.2d 568 (1950).

363. *Amandes*, in *From Voir Dire to Verdict Through a Juror's Eyes*, 9 PRAC. LAW. 21 (No. 6, 1963), indicates that he believes this to have been the case with a series of jury deliberations in which he participated.

recently-propounded Code of Trial Conduct of the American College of Trial Lawyers.³⁶⁴ Several of the devices which have produced the appellate literature discussed above are expressly condemned in Article 20 of this document:

- (a) In the voir dire examination of the jury a lawyer should not state or allude to any matter not relevant to the case or which he is not in a position to prove by admissible evidence.

* * *

- (c) A lawyer should never misstate the evidence or state as fact any matter not in evidence
- (d) A lawyer should not include in the content of any question the suggestion of any matter which is obviously inadmissible or which he knows is untrue.

* * *

- (g) A lawyer should not ask improper questions or attempt to get before the jury evidence which is improper. In all cases in which he has any doubt about the propriety of any disclosure to the jury a request should be made for leave to approach the bench and obtain a ruling out of the jury's hearing, either by propounding the question and obtaining a ruling or by making an offer of proof.

Courts have the equipment for dealing with lawyers who violate these principles, and some recent authority demonstrates an all-too-rare awareness of this fact.³⁶⁵ The Alaska Supreme Court last year criticized one of its trial judges for his failure to control misconduct, and suggested that he try to effect control through "disciplinary action by the court and imposition of costs in the event of mistrial."³⁶⁶ Justice Musmanno of the Supreme Court of Pennsylvania devoted a substantial part of a 1962 opinion on jury prejudice to fatherly criticism of a young lawyer who showed inadequate respect for one of his elder brothers;³⁶⁷ his opinion obviously proceeds from the assumption that public correction of members of the Bar is probably a more effective remedy for misconduct than punishment of clients. The Supreme Court of Illinois was even more blunt, in a 1956 opinion, suggesting that

364. AMERICAN BAR ASS'N, CANONS OF PROFESSIONAL ETHICS 1, 15, 16, 17, 18, 22, 23, 25, 29, 32; AMERICAN COLLEGE OF TRIAL LAWYERS, CODE OF TRIAL CONDUCT (1963), reprinted at 32 JOUR. BAR ASS'N KAN. 117 (1963-64).

365. *Skeeters v. Skeeters*, 389 P.2d 313 (Ore. 1964); *Connelly v. Nolte*, 237 Iowa 114, 21 N.W.2d 311 (1946). Not all of this vigor is new; see *Saxton v. Pittsburg Rys.*, 219 Pa. 492, 68 Atl. 1022 (1908).

366. *Ridgeway v. North Star Terminal & Stevedoring Co.*, 378 P.2d 647, 650 (Alaska 1963); see *Burnett v. Hernandez*, 263 F.2d 212 (9th Cir. 1959); *Martin v. Dretsch*, 234 Ore. 138, 380 P.2d 788 (1963).

367. *Lobalzo v. Varoli*, 409 Pa. 15, 185 A.2d 557 (1962).

the offender be given fine or jail sentence for his misconduct.³⁶⁸ The Wisconsin court has suggested that a strong rebuke, in the presence of the jury, might do more to slow the lawyer down, and to cure the effect of prejudicial conduct, than the customary therapeutic instruction.³⁶⁹ The Supreme Court of Iowa, opining last year that "in the administration of justice truth is more effective than mystery,"³⁷⁰ joined the Wisconsin judges in favoring explanations to the jury in an attempt to stop prejudice and reduce its effect. A right of reply in the offended party is another means of dealing with prejudice, although one that probably does more harm than good.³⁷¹

Most of these suggestions for dealing with errant lawyers have more merit than the Draconian penchant appellate judges have for making clients suffer the consequences of what their lawyers do. Certainly not all of the recent literature on this subject is depressing. Much of it—the Oregon opinion in the *Skeeters* case, for instance, and the Illinois cases which have followed *Crutchfield v. Meyer*³⁷²—is realistic, and therefore encouraging to any rational effort to deal with prejudicial trial conduct. Neither judges nor anyone else this side of heaven can prevent the risk a citizen takes in choosing his lawyer, but there has to be some effort by judges to direct purgatives at the real cause of prejudiced verdicts—the errant lawyer. No court is without ample power to discipline its bar, and no court need penalize clients in doing it.

IV. CONCLUSION: UNUSED RESOURCES

It is only when principle is . . . realized as a living and necessary thing, with as clear a pedigree and explanation as a horse or a king, that it can become really a part of the lawyer's thought and judgment and professional equipment.

*Woodrow Wilson*³⁷³

The preservation of fair trial in civil cases depends in the first instance on a disciplined and ethical Bar. The fact that most lawyers

368. *Eizerman v. Behn*, 9 Ill. App. 2d 263, 132 N.E.2d 788 (1956).

369. *Sullivan v. Collins*, 107 Wis. 291, 83 N.W. 310 (1900). But see *Hamilton v. Harrison*, 126 Kan. 188, 268 Pac. 119 (1928). This theory has its weakness—which the Kansas court recognized—in the danger to the client which might come from openly rebuking his lawyer. See also *Amandes*, *supra* note 363; and *White v. Crow*, 198 N.E.2d 222 (Ind. 1964).

370. *Price v. King*, 122 N.W.2d 318, 322 (Iowa 1963). See also *Berger v. United States*, 295 U.S. 78 (1935); 1 WIGMORE, EVIDENCE 250-51 (3d ed. 1940).

371. *Cook v. Latimer*, 274 Ala. 283, 147 So. 2d 831 (1962); *Eizerman v. Behn*, 9 Ill. App. 2d 263, 132 N.E.2d 788 (1956); *Brabeck v. Chicago & N.W. Ry.*, 117 N.W.2d 921 (Minn. 1962); 1 WIGMORE, EVIDENCE 250-351 (3d ed. 1940).

372. 414 Ill. 210, 111 N.E.2d 142 (1953).

373. *Legal Education of Undergraduates*, 17 A.B.A. REP. 439, 445-46 (1894).

are eligible for membership in that kind of Bar is obvious from the ideals they daily expound and defend; the Canons of Ethics of the American Bar Association and the Code of Trial Conduct of the American College of Trial Lawyers are two potent pieces of evidence to prove this. But many lawyers, possibly from a lack of professional independence, are too immersed in victory to respect their commitment to the fair and effective administration of justice. The profession is able to deal with this small number of its members, but it has rarely even attempted to do so. How many bar association disciplinary proceedings are brought for flagrant abuse of the tribunals of justice? How many could be brought? In this area of self-discipline (and one of the essential ingredients of any profession is self-discipline) the profession is failing to perform its duty.

To the extent that the organized profession fails to exact honorable trial conduct from the few lawyers disposed to erode the dignity of the courts, the remedy must come primarily from trial judges. Here again, though, there is unused power and unmet responsibility. Every trial judge has contempt power; every trial judge can suspend erring members of his bar from practice; every trial judge can recommend action against disrespectful lawyers by appropriate bar association committees. Too few trial judges attempt to exact honorable conduct from lawyers. More may, as judicial tenure reforms gain ground, and as the possibility diminishes of an able judge losing his post when his political party has a bad year. There is, fortunately, a growing demand from appellate courts, in their supervisory capacities, that trial judges be more active in assuring the fair conduct of litigation.

Certainly not all prejudice comes into trial records through misconduct. Even for inadvertent prejudice, the trial judge often has unused remedies. The pretrial conference, for instance, is rarely used in many state courts in spite of the fact that pretrial conferences, and, to a lesser extent, motions before trial to suppress evidence and strike pleadings, and motions at the bench during trial to avoid prejudice contain enormous potential for the prevention of prejudicial verdicts. A pretrial order, finally, provides a sure guideline for the conduct of advocates and adequate ground for stern discipline from the bench if pretrial directives are ignored.

In one of his peerless studies on class gifts, Dean A. James Casner concluded that:

Some of the precedents established and followed are subject to criticism. But on the whole the courts have done a remarkable

piece of work in the light of the mess that has been made of the job of draftsmanship.³⁷⁴

Somewhat the same sentiment must occur to the reader in connection with the work of appellate courts dealing with prejudiced verdicts. They operate, and have always operated, with great handicaps. They receive in most cases a problem that could have been corrected, or prevented, by honorable conduct from the advocates in the case and alert conduct from the trial judge. They propound fictions in dealing with their work, but they do this only because time and space forbid the careful correction of (to paraphrase Dean Casner) the mess that has been made of the job of trialmanship. While they probably have been seriously unrealistic in the bad faith cases, this unrealism is mitigated by the fact that appellate judges recognize a disciplined bar as the first essential of fair trial. They recognize that they are in a poor position to impose the discipline that the organized bar and the trial bench should have imposed before the case came to trial, and at each moment of the trial.

"The whole legal profession is pre-eminently a manly one," Sir James Stephen said. "It is a calling in which success is impossible to the weak or timid, and in which everyone, judge or barrister, is expected to do his duty without fear or favor to the best of his ability and judgment."³⁷⁵ There is, it seems to me, some of Stephen's challenge hidden in the prejudiced verdict cases.

374. Casner, *Class Gift to Others than to "Heirs" or "Next of Kin"—Increased in the Class Membership*, 51 HARV. L. REV. 254, 308 (1937).

375. Quoted in STRYKER, *FOR THE DEFENSE* 120 (1947).

